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WAR POWERS

UNDER THE

CONSTITUTION OF THE UNITED STATES.

MILITARY ARRESTS,
RECONSTRUCTION, AND MILITARY GOVERNMENT.

ALSO, NOW FIRST PUBLISHED,

WAR CLAIMS OF ALIENS.

WITH NOTES

ON THE

ACTS OF THE EXECUTIVE AND LEGISLATIVE DEPARTMENTS

DURING OUR CIVIL WAR,

AND A COLLECTION OF

CASES DECIDED IN THE NATIONAL COURTS.

BY WILLIAM WHITING.

FORTY-THIRD EDITION.

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PREFACE TO THE SECOND EDITION.

WAR POWERS OF THE PRESIDENT, AND LEGISLATIVE POWERS OF CONGRESS, IN RELATION TO REBELLION, TREASON, AND SLAVERY.

THE following pages were not originally intended for publication, but were written by the author for his private use. He has printed them at the request of a few friends, to whom the opinions therein expressed had been communicated; and he is not unaware of several errors of the press, and of some inaccuracies of expression, which, in one or two instances, at least, modify the sense of the statements intended to be made. The work having been printed, such errors can conveniently be corrected only in the "*errata*." This publication was principally written in the spring of 1862, the chapter on the operation of the Confiscation Act of July 17th, 1862, having been subsequently added. Since that time President Lincoln has issued his Emancipation Proclamation, and several military orders, operating in the Free States, under which questions have arisen of the gravest importance. The views of the author on these subjects have been expressed in several recent public addresses; and, if circumstances permit, these subjects may be discussed in a future addition to this pamphlet.

To prevent misunderstanding, the learned reader is requested to observe the distinction between emancipating or confiscating slaves, and abolishing the laws which sustain slavery in the Slave

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States. The former merely takes away slaves from the possession and control of their masters; the latter deprives the inhabitants of those States of the lawful right of obtaining, by purchase or otherwise, or of holding slaves. Emancipation or confiscation operates only upon the slaves personally; but a law abolishing the right to hold slaves, in the Slave States, operates on all citizens residing there, and effects a change of local law. If all the horses now in Massachusetts were to be confiscated, or appropriated by government to public use, though this proceeding would change the legal title to these horses, it would not alter the laws of Massachusetts as to personal property; nor would it deprive our citizens of the legal right to purchase and use *other* horses.

The acts for confiscation or emancipation of enemy's slaves, and the President's Proclamation of the 22d of September, do not abolish slavery as a legal institution in the States; they act upon persons held as slaves; they alter no local laws in any of the States; they do not purport to render slavery unlawful; they merely seek to remove slaves from the control of rebel masters. If slavery shall cease by reason of the legal emancipation of slaves, it will be because slaves are removed; nevertheless, the laws that sanction slavery may remain in full force. The death of all the negroes on a plantation would result in a total loss to the owner of so much "property;" but that loss would not prevent the owner from buying other negroes, and holding them by slave laws. Death does not interfere with the local law of property. Emancipation and confiscation, in like manner, do not necessarily interfere with local law establishing slavery.

The right to liberate slaves, or to remove the condition or *status* of slavery, as it applies to all slaves living at any one time, or the right to abolish slavery in the sense of liberating all existing slaves, is widely different and distinct from the right of repealing or annulling the laws of States which sanction the holding of slaves. State slave laws may or may not be beyond the reach of the legislative powers of Congress; but if they are, that fact

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would not determine the question as to the right to emancipate, liberate, or to change the relation to their masters of slaves *now living;* nor the question as to the right of abolishing slavery, in the sense in which this expression is used when it signifies the liberation of persons now held as slaves, from the operation of slave laws; while these laws are still left to act on other persons who may be hereafter reduced to slavery under them.

It is not denied that the powers given to the various departments of government are in general *limited* and defined; nor is it to be forgotten that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Const. Amendment, Art. X.) But the powers claimed for the President and for Congress, in this essay, are believed to be delegated to them respectively under the constitution, expressly or by necessary implication.

The learned reader will also notice, that the positions taken in this pamphlet do not depend upon the adoption of the most liberal construction of the constitution, Art. I. Sect. 8, Cl. 1, which is deemed by eminent statesmen to contain a distinct, substantive power to pass all laws which Congress shall judge expedient "*to provide for the common defence and general welfare.*" This construction was held to be the true one by many of the original framers of the constitution and their associates; among them was George Mason of Virginia, who opposed the adoption of the constitution in the Virginia convention, because, among other reasons, he considered that the true construction. (See Elliott's Debates, vol. ii. 327, 328.) Thomas Jefferson says, (Jefferson's Correspondence, vol. iv. p. 306,) that this doctrine was maintained by the *Federalists as a party*, while the opposite doctrine was maintained by the Republicans as a party.* Yet it is true that several Federalists did not adopt

* Elbridge Gerry, of Massachusetts, founded his chief objections to the Constitution on the grounds, 1. That the legislature had power to make what laws they might please to call necessary and proper; 2. To raise armies and money without limit; 3. To establish tribunals without juries. Other objections he could waive. These he could not. Gerry, Gov. Mason and Edmund Randolph, Jr., of Virginia, did not vote for the adoption of the Constitution.

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that view, but Washington, Adams, Jefferson, Madison, Monroe, Hamilton, Mason, and others, were quite at variance as to the true interpretation of that much contested clause. Southern statesmen, drifting towards the state-rights doctrines, as time passed on, have generally adopted the strictest construction of the language of that clause; but it has not yet been authoritatively construed by the Supreme Court. Whatever may be the extent or limitation of the power conveyed in this section, it is admitted by all that it contains the power of imposing taxes to an unlimited amount, and the right to appropriate the money so obtained to "the common defence and public welfare." Thus it is obvious, that the right to appropriate private property to public use, and to provide compensation therefor, as stated in Chapter I.; the power of Congress to confiscate enemy's property as a belligerent right; the power of the President, as commander-in-chief, as an act of war, to emancipate slaves; or the power of Congress to pass laws to aid the President, in executing his military duties, by abolishing slavery, or emancipating slaves, under Art. I. Sect. 8, Cl. 18, as *war measures*, essential to save the country from destruction, do not depend upon the construction given to the disputed clause above cited.

It will also be observed, that a distinction is pointed out in these pages between the legislative powers of Congress, in time of peace, and in time of war. Whenever the words "*the common defence*" are used, they are intended to refer to a time, not of constructive war, but of actual open hostility, which requires the nation to exert its naval and military powers in self-defence, to save the government and the country from destruction.

The Introduction, and Chapters I. and VIII., should be read in connection, as they relate to the same subject; and the reader will bear in mind that, in treating of the powers of Congress in the first chapter, it is not asserted that Congress have, *without any public necessity justifying it*, the right to appropriate private property of any kind to public use. There must always be a justifiable cause for the exercise of every delegated power of legislation.

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It is not maintained in these pages that Congress, in time of peace, has the right to abolish slavery in the States, by passing laws rendering the *holding of any slaves* therein illegal, so long as slavery is merely a household or family, or domestic institution and so long as its existence and operation are confined to the States where it is found, and concern *exclusively* the domestic affairs of the Slave States; and so long as it does not conflict with or affect the rights, interests, duties, or obligations which appertain to the *affairs of the nation*, nor impede the execution of the laws and constitution of the United States, nor conflict with the rights of citizens under them. Yet cases might arise in which, in time of peace, the abolishment of slavery might be necessary, and therefore would be lawful, in order to enable Congress to carry into effect some of the express provisions of the constitution, as for example, that contained in Art. IV. Sect. 4, Cl. 1, in which the United States guarantee to every State in this Union a republican form of government; or that contained in Art. IV. Sect. 2, Cl. 1, which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

It is asserted in this essay that, when the institution of slavery no longer concerns only the household or family, and no longer continues to be a matter exclusively appertaining to the domestic affairs of the State in which it exists; when it becomes a potent, operative, and efficient instrument for carrying on war against the Union, and an important aid to the public enemy; when it opposes the national military powers now involved in a gigantic rebellion; when slavery has been developed into a vast, an overwhelming *war power*, which is actually used by armed traitors for the overthrow of government and of the constitution; when it has become the origin of civil war, and the means by which hostilities are maintained in the deadly struggle of the Union for its own existence; when a local institution is perverted so as to compel three millions of loyal colored sub-

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jects to become belligerent traitors because they are held as slaves of disloyal masters, — then indeed slavery has become an affair most deeply affecting the national welfare and common defence, and has subjected itself to the severest enforcement of those legislative and military powers, to which alone, under the constitution, the people must look to save themselves from ruin. In the last extremity of our contest, the question must be decided whether slavery shall be rooted up and extirpated, or our beloved country be torn asunder and given up to our conquerors, our Union destroyed, and our people dishonored? Are any rights of property, or any claims, which one person can assume to have over another, by whatever local law they may be sanctioned, to be held, by any just construction of the constitution, as superior to the nation's right of self-defence? And can the local usage or law of any section of this country override and break down the obligation of the people to maintain and perpetuate their own government? Slavery is no longer local or domestic after it has become an engine of war. The country demands, at the hands of Congress and of the President, the exercise of every power they can lawfully put forth for its destruction, not as an *object* of the war, but as a *means* of terminating the rebellion, if by destroying slavery the republic may be saved. These considerations and others have led the author to the conclusion stated in the following pages, "that Congress has the right to abolish slavery, when in time of war its abolishment is necessary to aid the commander-in-chief in maintaining the '*common defence*.'"*

W. W.

BOSTON, November 20, 1862.

Note to Tenth Edition. — The reader is referred to the Preface, pages v. and vi., for remarks upon the Constitution (Art. I. Sect. 8, clause 1) relating to the alleged power of Congress "to provide for the general welfare and common defence;" and, in addition to the authorities there cited, reference may be had to the speeches of Patrick Henry, who fully sustains the views of Mr. Jefferson. See also Story on the Constitution, Sect. 1286.

* See Note to Forty-third Edition, on "Slavery," p. 393. Also, Appendix.

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WAR POWERS.

PREFACE TO THE FORTY-THIRD EDITION.

Of previous editions of this work, thirty-two have been published in New York, and ten in Boston. In 1864 the Essays on "Military Arrests," "Reconstruction," and "Military Government" were reprinted in one volume with the "War Powers," as they treated of kindred subjects, and were intended to illustrate and apply to our national affairs the principles of constitutional law advocated in the earliest of these publications. A brief Essay has been added on "Claims against the United States to Compensation for injuries inflicted by our military or naval forces upon aliens who came into or resided in this country during the rebellion." It was originally prepared in its present form, at the request of the Secretary of the State Department, and was subsequently (1866) printed. Since that time it has been used in the War, State, and Navy Departments. New notes have been added for the purpose of giving the reader convenient reference to some of the proceedings of those departments relating to the war powers treated of in this work.

Several recent acts of Congress, decisions of the departments, and opinions, judgments, or official acts of officers and courts of of the United States are also cited or referred to in the Notes or printed in the Appendix to this edition, marking our progress in military jurisprudence, or limiting, defining, and establishing the war powers of the government.

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This comparatively novel and important branch of public law, developed in our recent civil war, ought not to be overlooked by jurists or statesmen. It should be made a subject of special instruction in schools for the education of lawyers. The neglect of it has proved a national calamity. If southern rebels, with all their treasonable notions on the subject of State rights, had recognized and appreciated the war powers of the Union, it is not probable that they would have attempted armed rebellion. Had the loyal people of the country and the administration promptly assumed and with energy employed those powers, treason might have been strangled at its birth; and if the judicial department, unbiassed by political proclivities of individual judges, shall ultimately sanction a liberal and statesman-like construction of the sovereign and belligerent rights of the people under our Constitution, it will, by so doing, strengthen the power of our government to defend itself against rebellion; it will increase our confidence in the stability of the republic, and it will become a new safeguard against the dangers of civil war.

To maintain the right of the majority to govern, to guard against future attempts at rebellion, to secure the supremacy of republican institutions in all parts of a country which contains so large a foreign population, and includes so vast a territory as ours, liable as it is to be disturbed by sectional jealousies and interests, the people must, hereafter, be always prepared to use promptly, when the occasion imperatively demands it, the war powers of their government. They must, therefore, not forget them in time of peace. Our recent civil war has, unfortunately, forced us to become familiar with them, and to recognize them as the only means by which the right to continue our existence as a nation under constitutional government may, and in the last resort must, be defended. By them the overthrow of rebel governments, the return of public enemies to the Union, the restoration of disloyal States, have been effected and controlled. By

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them the civil and political rights of eleven millions of our citizens have been regulated and established. Upon them the basis of the reconstructed Union stands. Yet every civil, judicial, or military act of the government which rests for justification upon the constitutional validity of the war power, will probably continue to be a subject of discussion for years to come — so long as the present generation of secessionists shall last. They have everything to gain, and nothing to lose, by repudiating the power which has conquered them. Though compelled to lay down their arms, they may continue their efforts to destroy the Union. Hence the vindication of the rights of the people against their enemies is still one of the duties of patriotic citizens, and is the only means of securing to our posterity the inestimable benefits derived from our civil war. For these reasons, lawyers, judges, statesmen, and the people of the United States ought never to lose sight of the war powers of the government under our Constitution.

W. W.

Boston, November 10, 1870.

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SLAVERY

UNDER

THE CONSTITUTION.

INTRODUCTORY CHAPTER.

THE CONSTITUTION.

THE Constitution of the United States was ordained and established by the people, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity.

HOW IT HAS BEEN VIOLATED.

A handful of slave-masters have broken up that Union, have overthrown justice, and have destroyed domestic tranquillity. Instead of contributing to the common defence and public welfare, or securing the blessings of liberty to themselves and their posterity, they have waged war upon their country, and have attempted to establish, over the ruins of the Republic, an aristocratic government founded upon Slavery.

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THE "PECULIAR INSTITUTION."

It is the conviction of many thoughtful persons that slavery has now become practically irreconcilable with republican institutions, and that it constitutes, at the present time, the chief obstacle to the restoration of the Union. They know that slavery can triumph only by overthrowing the republic; they believe that the republic can triumph only by overthrowing slavery.

THE PRIVILEGED CLASS.

Slaveholding communities constitute the only privileged class of persons who have been admitted into the Union. They alone have the right to vote for what they claim to hold as property, while in the free States citizens vote only for themselves. The former are allowed to count, as part of their representative numbers, three fifths of all slaves. If this privilege, which was accorded only to the original States, had not been extended (contrary, as many jurists contend, to the true intent and meaning of the constitution) so as to include other States subsequently formed, the stability of government would not have been seriously endangered by the temporary toleration of this "institution," although it was inconsistent with the principles which that instrument embodied, and revolting to the sentiments cherished by a people who had issued to the world the Declaration of Independence, and had fought through the revolutionary war to vindicate and maintain the rights of man.

UNEXPECTED GROWTH OF SLAVERY.

The system of involuntary servitude, which had received, as it merited, the general condemnation of

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leading southern and northern statesmen of this country, who were most familiar with its evils, and of all fair-minded persons throughout the world, seemed, at the time when our government was founded, about to vanish and disappear from this continent, when the spinning jenny of Crompton, the loom of Wyatt, the cotton gin of Whitney, and the manufacturing capital of England, combined to create a new and unlimited demand for that which is now the chief product of southern agriculture. Suddenly, as if by magic, the smouldering embers of slavery were rekindled, and its flames, like autumnal fires upon the prairies, having swept over and desolated the Southern States, now threaten to destroy the free States of the North. Hence we are called on to encounter dangers and meet emergencies not anticipated by the founders of our government.

SLAVERY ABOLISHED BY EUROPEAN NATIONS.

In other countries the scene has been reversed. France, with unselfish patriotism, renounced slavery in 1794; and though Napoleon afterwards reëstablished servitude in most of the colonies, it was finally abolished in 1848. England has merited and received her highest tribute of honor from the enlightened nations of the world for that great act of Parliament, in 1833, whereby she proclaimed universal emancipation. In 1844 King Oscar informed the Swedish states of his desire to do away with involuntary servitude in his dominions; in 1846 the legislature provided pecuniary means for carrying that measure into effect; and now all the slaves have become freemen. Charles VIII., King of Denmark, celebrated the anniversary of

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the birth of the Queen Dowager by abolishing slavery in his dependencies, on the 28th of July, 1847. Within the present year (1862) the Emperor of Russia has consummated the last and grandest act of emancipation in modern times.* While Europe has thus adopted and approved the leading principle of our constitution, as founded on justice, and as essential to public welfare, the United States have practically repudiated and abandoned it. Europe, embarrassed by conservative and monarchical institutions, accepts the preamble to that instrument, as a just exposition of the true objects for which governments should be established, and accordingly abolishes involuntary servitude, while, in this country, slavery, having grown strong, seeks by open rebellion to break up the Union, and to destroy republican democracy.

SLAVERY IN 1862 NOT SLAVERY IN 1788.

However harmless African bondage may have been in 1788, it is now believed that the slave-masters of the present day, with few but honorable exceptions, cannot, or will not conduct themselves so as to render it longer possible, by peaceable association with them, to preserve the Union, to establish justice, insure domestic tranquillity, the general welfare, the common defence, or the blessings of liberty to ourselves or our posterity. The wide-spread but secret conspiracies of traitors in the slave States within the last thirty years, their hatred of our government, and determination to

* *Note to Tenth Edition.* — To the above we may add that Mexico abolished slavery, and prohibited it in all future time, by a law passed soon after her severance from Spain, and that the Dutch West Indies have followed these examples, by emancipating slaves under laws which went into operation in July, 1863.

Note to Forty-third Edition. — The first edict for the gradual emancipation of slaves in Cuba was passed by the Cortes of Spain, June 23, 1870, and was communicated to the Captain General of Cuba, July 4, and proclaimed to all interested by Caballero de Rodas, on the 28th of September, 1870.

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destroy it, their abhorrence of republican or democratic institutions, and their preference for an "oligarchy with slavery for its corner stone," have now become known to the people of the North. Their causeless rebellion, their seizure of the territory and property of the United States, their siege of Washington, their invasion of States which have refused to join them, their bitter, ineradicable, and universal hatred of the people of the free States, who are loyal to the government, have produced a general conviction that slavery (which alone has caused these results, and by which alone the country has been brought to the verge of ruin) must itself be terminated, and that this privileged class must be abolished; otherwise the union may be broken, the government overthrown, and constitutional liberty destroyed. To secure domestic tranquillity is to make it certain by controlling power. It cannot be thus secured while a perpetual uncontrollable cause of civil war exists. The cause, the means, the opportunity of civil war must be removed; the perennial fountain of all our national woes must be destroyed; otherwise "it will be vain to cry, Peace! peace! There is no peace." *

ARE SLAVEHOLDERS ARBITERS OF PEACE AND WAR?

Is the Union so organized that the means of involving the whole country in ruin must be left in the hands of a few irresponsible men, to be used at their discretion? Must the blessing of peace and good government be dependent upon the sovereign will and pleasure of a handful of treasonable and unprincipled

* For a brief reference to the legislative acts and constitutional amendments by which this result has been accomplished, see Notes to the Forty-third Edition, on "Slavery" p. 393.

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slave-masters? Has the constitution so chained and manacled peaceful citizens that they cannot wrench the murderous knife from an assassin's grasp, even in self-defence? If the destruction of slavery be necessary to save the country from defeat, disgrace, and ruin, and if the constitution, fairly interpreted, guarantees the perpetuity of slavery, whether the country is saved or lost, it is time that the friends of the Union should awake, and realize their awful destiny. If the objects for which our government was founded can lawfully be secured only so far as they do not interfere with the pretensions of slavery, we must admit that the interests of slave-masters stand first, and the welfare of the people of the United States stands last, under the guarantees of the constitution. If the Union, the constitution, and the laws, like Laocoön and his sons, are to be strangled and crushed, in order that the unrelenting serpent may live in triumph, it is time to determine which of them is most worthy to be saved. Such was not the Union formed by our forefathers. Such is not the Union the people intend to preserve. *They* mean to uphold a *Union, under the constitution, interpreted by common sense;* a *government* able to attain results worthy of a great and free people, and for which it was founded; a *republic,* representing the sovereign majesty of the whole nation, clothed with ample powers to maintain its supremacy forever. They mean that liberty and union shall be "one and inseparable."

WHY SLAVERY, THOUGH HATED, WAS PERMITTED.

It is true, that indirectly, and for the purpose of a more equal distribution of direct taxes, the founders of our

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government tolerated, while they condemned slavery; but they endured it because they believed that it would soon disappear. They even refused to allow the charter of their own liberties to be polluted by the mention of the word "slave." Having called the world to witness their heroic and unselfish sacrifices for the vindication of their own inalienable rights, they could not, consistently with honor or self-respect, transmit to future ages the evidence that some of them had trampled upon the inalienable rights of others.

RECOGNITION OF SLAVERY NOT INCONSISTENT WITH THE PERPETUITY OF THE REPUBLIC.

Though slavery was thus tolerated by being ignored, it would dishonor the memory of those who organized our government to suppose that they did not intend to bestow upon it the power to maintain its own authority and the right to overthrow slavery, or any other institution which might endanger its permanence, or destroy its usefulness. We should discredit the good sense of our forefathers, who established a free republic, created by and for themselves, by denying that they conferred upon it the right, the duty, and the power of *self-defence.* For self-defence by the government is only maintaining, through the people's agents, the right of the people to govern themselves.

DISTINCTION BETWEEN THE OBJECTS AND THE MEANS OF WAR.

We are involved in a war of self-defence. It is not the *object and purpose* of our hostilities to lay waste lands, burn bridges, break up railroads, sink ships, blockade harbors, destroy commerce, capture, imprison, wound, or kill citizens; to seize, appro-

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priate, confiscate, or destroy private property; to interfere with families, or domestic institutions; to remove, employ, liberate, or arm slaves; to accumulate national debt, impose new and burdensome taxes; or to cause thousands of loyal citizens to be slain in battle. But, as *means of carrying on the contest*, it has become necessary and lawful to lay waste, burn, sink, destroy, blockade, wound, capture, and kill; to accumulate debt, lay taxes, and expose soldiers to the peril of deadly combat. Such are the ordinary results and incidents of war. If, in further prosecuting hostilities, the liberating, employing, or arming of slaves shall be deemed convenient for the more certain, speedy, and effectual overthrow of the enemy, the question will arise, whether the constitution prohibits those measures as acts of legitimate war against rebels, who, having abjured that constitution and having openly in arms defied the government, claim for themselves only the rights of belligerents.

It is fortunate for America that securing the liberties of a great people by giving freedom to four millions of bondmen would be in accordance with the dictates of justice and humanity. If the preservation of the Union required the enslavement of four millions of freemen, very different considerations would be presented.

LIBERAL AND STRICT CONSTRUCTIONISTS.

The friends and defenders of the constitution of the United States of America, ever since its ratification, have expressed widely different opinions respecting the limitation of the powers of government in time of peace, no less than in time of war. Those who have contended for the most narrow and technical construc-

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tion, not appreciating the spirit in which it was framed, have kept to the letter of the text, and seemed unable to regard it as only a frame of government, a plan in outline for regulating the affairs of an enterprising and progressive nation. They have supposed it incapable of adaptation to our changing conditions, as if it were a form of clay, which the slightest jar would shatter; or an iron chain, girdling a living tree, which could have no further growth unless by bursting its rigid ligature. But sounder judges believe that it more resembles the tree itself, native to the soil that bore it, waxing strong in sunshine and in storm, putting forth branches, leaves, and roots, according to the laws of its own growth, and flourishing with eternal verdure. Our constitution, like that of England, contains all that is required to adapt itself to the present and future changes and wants of a free and advancing people. This great nation, like a distant planet in the solar system, may sweep round a wide and splendid orbit, but it will not pass beyond the reach of its central light. The sunshine of constitutional law will illumine its pathway in all its changing revolutions. We have not yet approached the "dead point" where the mould must be shattered, the chain broken, the tree girdled, or the sun shed darkness instead of light. By a liberal construction of the constitution, our government has passed through many storms unharmed. Slaveholding States, other than those whose inhabitants originally formed it, have found their way into the Union, notwithstanding the guarantee of equal rights to all. The territories of Florida and Louisiana have been purchased from European powers. Conquest has added a nation to our borders. The purchased and the

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conquered regions are now legally a part of the United States. The admission of new States containing a privileged class, the incorporation into our Union of a foreign people, are held to be lawful and valid by all the courts of the country. Thus far from the old anchorage have we sailed under the flag of "public necessity," "general welfare," or "common defence." Yet the great charter of our political rights "still lives;" and the question of to-day is, whether that instrument, which has not prevented America from acquiring one country by purchase, and another by conquest, will permit her to *save herself?*

POWERS WE SHOULD EXPECT TO FIND.

If the ground-plan of our government was intended to be more than a temporary expedient,—if it was designed, according to the declaration of its authors, for a *perpetual* Union,—then it will doubtless be found, upon fair examination, to contain whatever is essential to carry that design into effect. Accordingly, in addition to provisions for adapting it to great changes in the situation and circumstances of the people by *amendments*, we find that powers essential to its own perpetuity are vested in the executive and legislative departments, to be exercised *according to their discretion*, for the good of the country—powers which, however dangerous, must be intrusted to every government, to enable it to maintain its own existence, and to protect the rights of the people. Those who founded a goverment for themselves intended that it should never be overthrown; nor even altered, except by those under whose authority it was established. Therefore they gave to the President, and to Congress, the means

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essential to the preservation of the republic, but none for its dissolution.*

LAWS FOR PEACE, AND LAWS FOR WAR.

Times of peace have required the passage of numerous statutes for the protection and development of agricultural, manufacturing, and commercial industry, and for the suppression and punishment of ordinary crimes and offences. A state of general civil war in the United States is, happily, new and unfamiliar. These times have demanded new and unusual legislation to call into action those powers which the constitution provides for times of war.

Leaving behind us the body of laws regulating the rights, liabilities, and duties of citizens, in time of public tranquillity, we must now turn our attention to the RESERVED and HITHERTO UNUSED powers contained in the constitution, which enable Congress to pass a body of laws to regulate the rights, liabilities, and duties of citizens in time of war. We must enter and explore the arsenal and armory, with all their engines of defence, enclosed, by our wise forefathers for the safety of the republic, within the old castle walls of that constitution; for now the garrison is summoned to surrender; and if there be any cannon, it is time to unlimber and run them out the port-holes, to fetch up the hot shot, to light the match, and 'hang out our banners on the *outer* walls.'

THE UNION IS GONE FOREVER IF THE CONSTITUTION DENIES THE POWER TO SAVE IT.

The question whether republican constitutional government shall now cease in America, must depend upon

* "The members of the American family," says the Supreme Court in the case of *Rhode Island* v. *Massachusetts*, "possess ample means of defence under the Constitution, which we hope ages to come will verify."

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the construction given to these *hitherto unused powers.* Those who desire to see an end of this government will deny that it has the ability to save itself. Many new inquiries have arisen in relation to the existence and limitation of its powers. Must the successful prosecution of war against rebels, the preservation of national honor, and securing of permanent peace,—if attainable only by rooting out the evil which caused and maintains the rebellion,—be effected by destroying rights solemnly guaranteed by the constitution we are defending? If so, the next question will be, whether the law of self-defence and overwhelming necessity will not justify the country in denying to rebels and traitors in arms whatever rights they or their friends may claim under a charter which they have repudiated, and have armed themselves to overthrow and destroy? Can one party break the contract, and justly hold the other party bound by it? Is the constitution to be so interpreted that rebels and traitors cannot be put down? Are we so hampered, as some have asserted, that even if war end in reëstablishing the Union, and enforcing the laws over all the land, the results of victory can be turned against us, and the conquered enemy may then treat us as though they had been victors? Will vanquished criminals be able to resume their rights to the same political superiority over the citizens of free States, which, as the only privileged class, they have hitherto enjoyed? Have they who are now engaged in this rebellion, and have committed treason and other high crimes against the republic, a protection against punishment for these offences, by reason of any rights, privileges, or immunities guaranteed to peaceful citizens by the constitu-

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tion? Cannot government, the people's agent, wage genuine and effectual war against the people's enemy? Must the soldier of the Union, when in action, keep one eye upon his rifle, and the other upon the constitutional rights of rebels? Is the power to make war, when once lawfully brought into action, to be controlled, baffled, and emasculated by any obligation to guard or respect rights set up by or for belligerent traitors?

THE LEADING QUESTIONS STATED.

What limit, if any, is prescribed to the war-making power of the President, as Commander-in-Chief of the Army and Navy of the United States? What are the rights of our government over the private property and persons of loyal citizens in time of civil war? What authority has Congress to frame laws interfering with the ordinary civil or political rights of peaceable citizens residing in the rebel States; or laws for the punishment or control of public enemies, who may be captured as spies, as pirates, as guerrillas, as aiders and comforters of armed traitors, or as Confederate soldiers on the battle-field? What are the powers of the President or of Congress in relation to the conquest and government of the inhabitants of belligerent districts of country? What laws may be established as to slaves captured or escaping into the lines of our armies, or into the free States; or as to slaves belonging to rebels, and used by them in their military service? Are slaves contraband of war? May they be released from all obligation to serve rebel masters? May slavery be destroyed as a military measure, or abolished by a legislative act, required by the public welfare and common defence, in time of civil war? In what department of

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government is the power vested by the constitution to abolish or destroy slavery? Is there any limit to the power of Congress to provide for the punishment of treason? What are the rights and liabilities of traitors? What are the war powers of the President, and the legislative powers of Congress in relation to rebellion, treason, and slavery? These and similar inquiries are frequently made among the plain people; and it is for the purpose of explaining some of the doctrines of law applicable to them, that the following suggestions have been prepared.

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CHAPTER I.

THE CONSTITUTIONAL RIGHT OF THE GOVERNMENT TO APPROPRIATE PRIVATE PROPERTY TO PUBLIC USE.

THE general government of the United States has, in time of peace, a legal right, under the constitution, to appropriate to public use the private property of any subject, or of any number of subjects, owing it allegiance, whenever justified by public necessity. Each of the States claims and exercises a similar right over the property of its own citizens.

THIS RIGHT IS FOUNDED IN REASON.

All permanent governments in civilized countries assert and carry into effect, in different ways, the claim of "eminent domain;" for it is essential to their authority, and even to their existence. The construction of military defences, such as forts, arsenals, roads, bridges or canals, however important for the protection of a country in time of war, might be prevented by private interests, if the property of individuals could not be lawfully taken for public use. Internal improvements in time of peace, however beneficial to the public, requiring the appropriation of real estate belonging to individuals, might be interrupted, if there were no power to take, without the consent of the owner, what the public necessities require. And as it is the government which protects all citizens in their rights to life, liberty, and property, they are deemed to hold their property subject to the claim of the supreme protector

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to take it from them when demanded by "public welfare." It is under this quasi sovereign power that the State of Massachusetts seizes by law the private estates of her citizens; and she even authorizes several classes of corporations to seize land, against the will of the proprietor, for public use and benefit. Railroads, canals, turnpikes, telegraphs, bridges, aqueducts, could never have been constructed were the existence of this great right denied. And the title to that interest in real estate, which is thus acquired by legal seizure, is deemed by all the courts of that commonwealth to be as valid, and as constitutional, as if purchased and conveyed by deed, under the hand and seal of the owner.

INDEMNITY IS REQUIRED.

When individuals are called upon to give up what is their own for the advantage of the community, justice requires that they should be fairly compensated for it: otherwise public burdens would be shared unequally. To secure the right to indemnification, which was omitted in the original constitution of the United States, an amendment was added, which provides that private property shall not be taken for public use without just compensation.* Similar provisions are found in the constitutions of Massachusetts and of several other States. The language of this amendment admits the authority of the government to take private property for public use, and, being now a part of the constitution, leaves that authority no longer open to question, if it ever has been questioned.

* See Amendment, Art. V., last clause.

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In guarding against the abuse of the right to take private property for public use, it is provided that the owner shall be entitled to be fairly paid for it; and thus he is not to be taxed *more than his due share* for public purposes.

It is not a little singular that the framers of the constitution should have been *less* careful to secure equality in distributing the burden of taxes. Sect. 8 requires *duties, imposts, and excises* to be *uniform* throughout the United States, but it does not provide that *taxes* should be uniform. Although Art. I., Sect. 9, provides that no *capitation* or other *direct tax* shall be laid unless in proportion to the census, yet far the most important subjects of taxation are still unprotected, and may be UNEQUALLY assessed, without violating any clause of that constitution, which so carefully secures equality of public burdens by providing compensation for private property appropriated to the public benefit.

"PUBLIC USE."

What is "*public use*" for which private property may be taken?

Every appropriation of property for *the benefit* of the United States, either for a national public improvement, or to carry into effect any valid law of Congress for the maintenance, protection, or security of national interests, is "public *use*." *Public use* is contradistinguished from *private use*. That which is for the *use of the country*, however applied or appropriated, is for public use.

Public use does not require that the property taken shall be actually *used*. It may be *disused, removed,* or *destroyed*. And destruction of private property may be the best public use it can be put to.

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Suppose a bridge, owned by a private corporation, to be so located as to endanger our forts upon the banks of a river. To demolish that bridge for military purposes, would be to appropriate it to public use. To raze private buildings in a city, for the purpose of preventing a general conflagration, would be to apply them to public use. To destroy arms, or other munitions of war, belonging to private persons, in order to prevent their falling into possession of the enemy, would be to devote them to public use. Congress has power, within certain limits, to pass laws providing for the common defence and general welfare, under Art. I. Sect. 8 of the constitution; and whenever, in their judgment, the common defence or general welfare, in a case of public necessity, requires them to authorize the appropriation of private property to public use, whether that use be the employment or destruction of the property taken, they have the right to pass such laws for that purpose; and whatever is done with it is a public use thereof, and entitles the owner to just compensation.

ALL KINDS OF PROPERTY, INCLUDING SLAVES, MAY BE SO APPROPRIATED.*

There is no restriction as to the kind or character of private property which may be lawfully thus appropriated, whether it be real estate, personal estate, rights in action or in possession, claims for money, or for labor and service. Thus the obligations of minor children to their parents, of apprentices to their masters, and of other persons owing labor and service to their masters,

* See the resolutions and the amendments of the constitution proposed by Congress on the subject of slavery a short time before this essay was written. Note, p. 132. See also Note to the Forty-third Edition, on "Slavery," p. 393.

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may lawfully be taken for public use, or discharged and destroyed, for public benefit, by authority of an act of Congress, with the proviso that just compensation shall be allowed to the parent or master. Our government, by treaty, discharged the claims of its own citizens against France, and thus applied their private property to public use. At a later date the United States discharged the claims of certain slave owners to labor and service, whose slaves had been carried away by the British, contrary to their treaty stipulations. In both cases indemnity was promised by our government to the owners; and in case of the slave masters it was actually paid. By abolishing slavery in the District of Columbia, that which was considered for the purposes of the act as private property was appropriated to public use, with just compensation to the owners; Congress, in this instance, having the right to pass the act as a local, municipal law; but the compensation was from the treasury of the United States.

During the present rebellion, many minors, apprentices, and slaves have been relieved from obligation to their parents and masters, the claim for their services having been appropriated to public use, by employing them in the military service of the country.

That Congress should have *power* to appropriate *every description* of private property for public benefit in time of war, results from the *duty* imposed on it by the constitution to pass laws "providing for the common defence and general welfare."

Suppose that a large number of apprentices desired to join the army as volunteers in time of sorest need, but were restrained from so doing only by reason of their owing labor and service to their employers, who

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were equally with them citizens and subjects of this government; would any one doubt that Congress could authorize it to accept these apprentices as soldiers, to discharge them from the obligation of their indentures, providing just compensation to their employers for loss of their services? Suppose that these volunteers owed labor and service for life, as slaves, instead of owing it for a term of years; what difference could it make as to the right of government to use their services, and discharge their obligations, or as to the liability to indemnify the masters? The right to use the services of the minor, the apprentice, and the slave, for public benefit, belongs to the United States. The claims of all American citizens upon their services, whether by local law, or by common law, or by indentures, can be annulled by the same power, for the same reasons, and under the same restrictions that govern the appropriation of any other private property to public use.

THE UNITED STATES MAY REQUIRE ALL SUBJECTS TO DO MILITARY DUTY.*

Slaves, as well as apprentices and minors, are equally *subjects* of the United States, whether they are or are not *citizens* thereof. The government of the United States has the right to call upon all its subjects to do *military duty*. If those who owe labor and service to others, either by contract, by indenture, by common or statute law, or by local usage, could not be lawfully called upon to *leave* their employments to serve their country, no inconsiderable

* See Note to Forty-third Edition, p. 478, on "Laws for raising and organizing Military Forces." Since the publication of the fourth edition Congress has passed the act of March 3, 1863, and the act of February 24, 1864, which provides for the enrolment of colored men and slaves. See also *Kneedler* v. *Lane*, 9 Wright, 228.

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portion of the able-bodied men would thus be exempt, and the Constitution and laws of the land providing for calling out the army and navy would be set at nought. But the Constitution makes no such exemptions from military duty. Private rights cannot be set up to overthrow the claims of the country to the services of any one of its subjects who owes it allegiance.

How far the United States is under obligation to compensate parents, masters of apprentices, or masters of slaves, for the loss of service and labor of those subjects who are enlisted in the army and navy, has not been yet decided.* The constitution recognizes slaves as "*persons held to labor or service.*" So also are apprentices and minor children "persons held to labor and service." And, whatever other claims may be set up, by the laws of either of the slave states, to any class of "persons," the constitution recognizes *only* the claim of individuals to *the labor and service* of other individuals. It seems difficult, therefore, to state any sound principle which should require compensation in one case and not in the other.

WILL SLAVEHOLDERS BE ENTITLED TO INDEMNITY IF THEIR SLAVES ARE USED FOR MILITARY PURPOSES?

It is by no means improbable, that, in the emergency which we are fast approaching, the right and duty of the country to call upon *all* its *loyal subjects* to aid in its military defence *will be deemed paramount to the*

* If an apprentice enlist in the army, the courts will not, upon a *habeas corpus*, issued at the relation of the master, *remand* the apprentice to his custody, if he be *unwilling* to return, but will leave the master to his suit against the officer, who, by Stat. March 16, 1802, was forbidden to enlist him without the master's consent. *Commonwealth* v. *Robinson*, 1 S. & R. 353; *Commonwealth* v. *Harris*, 7 Pa. L. J. 283.

Note to Forty-third Edition. — This question, as it regards slaves, has been decided by the act of February 24, 1864. See the Note on "Slavery," p. 393; also Index, title "Indemnity;" also the Note on "Compensation to Slave Masters for Slaves enlisted into Military Service," p. 405; also "Solicitor's Opinions," Records of the War Department, March 5 and 10, May 20, and July 30, 1864.

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claims of any private person upon such subjects, and that the loss of *labor and service* of certain citizens, like the loss of life and property, which always attends a state of war, must be borne by those upon whom the misfortune happens to fall. It may become one of the great political questions hereafter, whether, if slavery should as a civil act in time of peace, or by treaty in time of war, be wholly or partly abolished, for *public benefit,* or *public defence,* such abolishment is *an appropriation* of *private property* for public use, *within the meaning of the constitution.*

INDEMNITY TO MORMONS.

The question has not yet arisen in the courts of the United States, whether the act of Congress, which, under the form of a statute against polygamy abolishes Mormonism, a domestic institution, sustained like slavery only by local law, is such an appropriation of the claims of Mormons to the labor and service of their wives as requires just compensation under the constitution? A decision of this question may throw some light on the point now under consideration.

EFFECT OF NATURALIZATION AND MILITIA LAWS ON THE QUESTION OF INDEMNITY TO SLAVE-MASTERS.

A further question may arise as to the application of the "compensation" clause above referred to. That Congress has authority to pass naturalization laws, by Art. I., Sect. 8, has never been doubted. The only question is, whether it is not exclusive.* Statutes may thus be passed which would give the privileges of citizenship to any person whatsoever, black or white.

* See *Chirac* v. *Chirac,* 2 Wheat. 269; *United States* v. *Villato,* 2 Dall. 372; *Thirlow* v. *Mass.,* 5 How. 585; *Smith* v. *Turner,* 7 ib. 556; *Golden* v. *Prince,* 3 W. C. C. Reports, 314.

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Colored men, having been citizens in some of the States ever since they were founded, and having acted as such prior to 1788, in various civil and military capacities, are deemed by eminent jurists citizens of the United States.* Under our present laws, according to the opinion of the attorney-general of Massachusetts, colored men are equally with white men required to be enrolled in the militia of the United States,† although such was not the case under the previous acts of 1792 and 1795. "The general government has authority to determine who shall and who may not compose the militia of the United States; and having so determined, the state government has no legal authority to prescribe a different enrolment.‡ If, therefore, Congress exercise either of these undoubted powers to grant *citizenship* to all colored persons residing or coming within either of the States, or to pass an act requiring *the enrolment* of all able-bodied persons within a prescribed age, whether owing labor and service or not,§ as *part of the militia of the United States*, and thereby giving to all, as they become soldiers or seamen, their freedom from obligations of labor and service, except *military* labor and service, then the question would arise, whether government, by calling its own subjects and citizens into the military service of the country, in case of overwhelming necessity, could be required by the constitution to recognize the private relations in which the soldier might stand, by *local* laws, to persons setting up claims against him? If white subjects or citizens owe labor and service, even by formal indentures, such

* See the case of *Dred Scott*, which in no part denies that if colored men *were* citizens of either of the States which adopted the Constitution, they were citizens of the United States.

† See Stat. United States, July 17, 1862. But see Note, p. 478.

‡ 8 Gray's R. 615.

§ See Act approved February 24, 1864.

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obligations afford no valid excuse against the requisition of government to have them drafted into the militia to serve the country. No compensation should be allowed to those who claim indemnity for the loss of such "labor and service." Whether the *color* of the debtor, or the *length* of time during which the obligation (to labor and service) has to run, or the *evidence* by which the *existence* of the obligation is proved, can make an essential difference between the different kinds of labor and service, remains to be seen. The question is, whether the soldier or seaman, serving his country in arms, can be deemed *private property*, as recognized in the constitution of the United States?*

DOES THE WAR POWER OF SEIZURE SUPERSEDE THE CIVIL POWER OF CONGRESS TO APPROPRIATE PRIVATE PROPERTY TO PUBLIC USE?

That the property of any citizen may, under certain circumstances, be seized in time of war, by *military officers*, for public purposes, is not questioned, just compensation being offered, or provided for; but the question has been asked, whether this power does not supersede the right of Congress, in war, to pass laws to take away what martial law leaves unappropriated?

This inquiry is conclusively answered by reference to the amendment of the constitution, above cited, which admits the existence of that power in CONGRESS;† but in addition to this, there are other clauses which devolve powers and duties on the legislature, giving them a large and important share in instituting, organizing, carrying on, regulating, and ending war; and these duties could not, under all circumstances, be discharged in war, without exercising the right to take for public

* *Note to Forty-third Edition.* — This question has been settled by the action of all the departments of our government.

† Amendments, Art. V., last clause.

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use the property of the subject. It would seem strange if private property could not be so taken, while it is undeniable that in war the government can call into the military service of the country every able-bodied citizen, and tax his property to any extent.

REFERENCES TO THE CONSTITUTION, SHOWING THE WAR POWERS OF CONGRESS.

The preamble to the Constitution declares the objects for which it was framed, in the following words: —

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The war powers of the legislative department are set forth chiefly in Art. I. Sect. 8 of the Constitution, which provides that —

"The Congress shall have power, —

1. "To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

11. "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

12. "To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years."

13. "To provide and maintain a navy."

14. "To make rules for the government and regulation of the land and naval forces."

15. "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

16. "To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respec-

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tively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

18. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

SLAVE PROPERTY SUBJECT TO THE SAME LIABILITY AS OTHER PROPERTY TO BE APPROPRIATED FOR WAR PURPOSES.

If the *public welfare* and *common defence*, in time of war, require that the claims of masters over their apprentices or slaves should be cancelled or abrogated, against their consent, and if a general law carrying into execution such abrogation, is, in the judgment of Congress, "a necessary and proper measure for accomplishing that object," there can be no question of the constitutional power and right of Congress to pass such a law.* The only doubt is in relation to the right to compensation. If it should be urged that to release slaves from their servitude would be, in effect, to impair or destroy the obligation of contracts, it may be replied that though states have no right to pass laws impairing the obligation of contracts, Congress is at liberty to pass such laws. The right to abrogate and cancel the obligations of apprentices and slaves does not rest solely upon the power of Congress to appropriate private property to public use; but it necessarily results from its obligation to use the proper means to accomplish one of the chief objects for which the Union was formed, namely, to provide for the *common defence* and *general welfare* of the United States in time of war.†

* *Note to Forty-third Edition.*— This principle was sanctioned and acted upon by the Confederate Congress in their Stat. February 17, 1864, Chap. 79, which authorized the seizure and impressment into their army of free negroes and slaves.

† See Note on "Compensation to Slave-masters," p. 405.

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IMPORTANCE AND DANGER OF THESE POWERS.

The powers conveyed in the 18th clause of Art. I., Sect. 8, are of *vast* importance and extent. It may be said that they are, in one sense, unlimited and discretionary. They are more than imperial. But it was intended by the framers of the constitution. or, what is of more importance, by the *people* who made and adopted it, that the powers of government in dealing with civil rights in time of peace, should be *defined* and limited; but the powers "to provide for the *general welfare* and the *common defence*" in time of war, should be *unlimited.* It is true that such powers may be temporarily abused; but the remedy is always in the hands of the people, who can unmake laws and select new representatives and senators.

POWERS OF THE PRESIDENT NOT IN CONFLICT WITH THOSE OF CONGRESS.

It is not necessary here to define the extent to which congressional legislation may justly control and regulate the conduct of the army and navy in service; or to point out the dividing line between civil and martial law. But the power of Congress to pass laws on the subjects expressly placed in its charge by the terms of the constitution cannot be taken away from it by reason of the fact that the President, as commander-in-chief of the army and navy, also has powers, equally constitutional, to act upon the same subject-matters. It does not follow that because Congress has a right to abrogate the claims of Mormons or slaveholders, the President, as commander, may not also do the same thing. These powers are not inconsistent, or conflicting. Congress may pass laws concerning captures on land and on the water. If slaves are captured, and are treated

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as "captured property," Congress should determine what is to be done with them;* and it will be the President's duty to see that *these* as well as other laws of the United States are *executed.*

CONGRESS HAS POWER UNDER THE CONSTITUTION TO ABOLISH SLAVERY.

Whenever, in the judgment of Congress, the common defence and public welfare, in time of war, require the removal of the condition of slavery, it is within the scope of its constitutional authority to pass laws for that purpose.†

If such laws are deemed to take private property for public use, or to destroy private property for public benefit, as has been shown, that may be done under the constitution, by providing just compensation; otherwise, no compensation can be required. It has been so long the habit of those who engage in public life to disclaim any intention to interfere with slavery in the States, that they have of late become accustomed to deny the *right of Congress* to do so. But *the constitution contains no clause or sentence prohibiting the exercise by Congress of the plenary power of abrogating involuntary servitude.* The only prohibition contained in that instrument relating to persons held to labor and service, is in Art. IV., which provides that, "No person held to service or labor in one state, *under the laws thereof*, escaping into another, shall, in consequence of any *law* or *regulation* "*therein*," be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due." Thus, if a slave or appren-

* Constitution, Art. I. Sect. 8, Cl. 11.

† *Note to Forty-third Edition.* — This has been done by a series of acts, and consummated by constitutional amendments. See Note on "Slavery," p. 393.

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tice, owing service to his employer in Maryland, escapes to New York, the legislature of New York cannot, by any law or regulation, legally discharge such apprentice or slave from his liability to his employer. *This restriction is, in express terms, applicable only to State legislatures, and not to Congress.*

Many powers given to Congress are denied to the States; and there are obvious reasons why the supreme government alone should exercise so important a right. That a power is withdrawn from the States, indicates, by fair implication, that *it belongs to the United States*, unless expressly prohibited, if it is embraced within the scope of powers necessary to the safety and preservation of the government, in peace or in civil war.

It will be remarked that the provision as to slaves in the constitution relates only to fugitives from labor escaping from one state into another; not to the *status* or *condition* of slaves in any of the states where they are held, while another clause in the constitution relates to *fugitives* from justice.* Neither clause has any application to citizens or persons who are not *fugitives*. And it would be a singular species of reasoning to conclude that, because the constitution prescribed certain rules of conduct towards persons *escaping from one State into another*, therefore there is no power to make rules relating *to other persons who do not escape from one State into another*. If Congress were expressly empowered to pass laws relating to persons *when escaping* from justice or labor by fleeing from their own States, it would be absurd to infer that there could be no power to pass laws relating to these same persons when staying at home. The govern-

* Constitution, Art. IV. Sect. 2.

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ment may pass laws requiring the return of fugitives: they may pass other laws punishing their crimes, or relieving them from penalty. The power to do the one by no means negatives the power to do the other. If Congress should discharge the obligations of slaves to render labor and service, by passing a law to that effect, such law would supersede and render void all rules, regulations, customs, or laws of either State to the contrary, for the constitution, treaties, and laws of the United States are the supreme law of the land. If slaves were released by act of Congress, or by the act of their masters, there would be no person *held to labor* as a slave by the laws of *any State,* and therefore there would be no person to whom the clause in the constitution restraining State legislation could apply. This clause, relating to fugitive slaves, has often been misunderstood, as it has been supposed to limit the power of *Congress,* while in fact *it applies in plain and express terms only to the States,* controlling or limiting *their* powers, but having no application to the general government. If the framers of the constitution intended to take from Congress the power of passing laws relating to slaves in the States or elsewhere, they would have drafted a clause to that effect. They did insert in that instrument a proviso that Congress should pass no law prohibiting the importation of such persons as any of the States should think proper to admit (meaning slaves) prior to 1808.* And if they did not design that the legislature should exercise control over the subject of domestic slavery, whenever it should assume such an aspect as to involve *national* interests, the introduction of the proviso relating to the slave

* Constitution, Art. I. Sect. 9.

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trade, and of several other clauses in the plan of government, makes the omission of any prohibition of legislation on slavery unaccountable.

CONCLUSION.

Thus it has been shown that the government has the right to appropriate to public use *private property* of every description; that "public use" may require the employment or the destruction of such property; that if the "right to the labor and service of others," as slaves, be recognized in the broadest sense as "property," there is nothing in the constitution which deprives Congress of the power to appropriate "that description of property" to public use, by terminating slavery, as to all persons now held in servitude, whenever laws to that effect are required by "the public welfare and the common defence" in time of war; that this power is left to the discretion of Congress, which is the sole and exclusive judge as to the occasions when it shall be exercised, and from that judgment there is no appeal. The right to "just compensation" for private property so appropriated will depend upon the circumstances under which it is taken, and the legal conditions of the claimant.*

NOTE. — As to the use of discretionary powers in *other* departments, see *Martin* v. *Mott*, 12 Wheat. 29–31; *Luther* v. *Borden*, 7 How. 44, 45.

* *Note to Forty-third Edition.* — See Solicitor's Opinions, illustrative of the manner in which these principles were applied by the War Department during the rebellion (pp. 357–390.) See also Note on "Slaves in the Army," p. 405.

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INTRODUCTION TO CHAPTER II.

THE Constitution, *Art. I., Sect.* 8, *clause* 18, gives Congress power ' to make *all laws* which shall be necessary and proper for carrying into execution the foregoing powers, and *all other powers* vested by this Constitution in the Government of the United States, or in any Department *or officer thereof.*"

Art. II., Sect. 2, *clause* 1, provides that "the President shall be *Commander-in-chief* of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States."

Art. I., Sect. 8, declares that "Congress shall have power to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions."

As the President is, within the sense of *Art. I., Sect.* 8, *clause* 18, "*an officer of government;*" and by virtue of *Art. II., Sect.* 2, *clause* 1, he is *Commander-in-chief of the Army and Navy*; and as, by virtue of *Art. II., Sect.* 2, *clause* 1, and *Art. I., Sect.* 8, the *power is vested in him as* "*an officer of the government*" to suppress rebellion, repel invasion, and to maintain the Constitution by force of arms, in time of war, and for that purpose to overthrow, conquer, and subdue the enemy of his country, so completely as to "*insure* domestic tranquillity,"—it follows by *Art. I., Sect.* 8, *clause* 18, that Congress may, in time of war, pass all laws which shall be necessary and proper to enable the President to carry into execution" all his military powers.

It is *his* duty to break down the enemy, and to deprive them of their means of maintaining war: Congress is therefore bound to pass such laws as will *aid* him in accomplishing that object.

If it has power to make laws for carrying on the government in time of peace, it has the power and duty to make laws to preserve it from destruction in time of war.

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CHAPTER II.

WAR POWERS OF CONGRESS.*

CONGRESS has power to frame statutes not only for the punishment of crimes, but also for the purpose of aiding the President, as commander-in-chief of the army and navy, in suppressing rebellion, and in the final and permanent conquest of a public enemy. "It may pass such laws as it may deem necessary," says Chief Justice Marshall, "to carry into execution the great powers granted by the constitution;" and "necessary means, in the sense of the constitution, does not import an absolute physical necessity, so strong that one thing cannot exist without the other. It stands for any means calculated to produce the end."

RULES OF INTERPRETATION.

The constitution provides that Congress shall have power to pass "all laws necessary and proper" for carrying into execution all the powers granted to the government of the United States, or any department or officer thereof. The word "necessary," as used, is not limited by the additional word "proper," but enlarged thereby.

"If the word *necessary* were used in the strict, rigorous sense, it would be an extraordinary departure from the usual course of the human mind, as exhibited in solemn instruments, to add another word, the only possible effect of which is to qualify that strict and rigorous meaning, and to present clearly the idea of a choice of means in the course of legislation. If no means are to be resorted to but such as

* For references to the clauses of the Constitution containing the war powers of Congress, see *ante*, pp. 25, 26.

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are *indispensably* necessary, there can be neither sense nor utility in adding the word '*proper*,' for the *indispensable necessity* would shut out from view all consideration of the *propriety* of the means." *

Alexander Hamilton says, —

"The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist WITHOUT LIMITATION, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means necessary to satisfy them. The circumstances which endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. . . . This power ought to be under the direction of the same councils which are appointed to preside over the *common defence*. . . . It must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community in any matter essential to its efficacy —that is, in any matter essential to the *formation*, *direction*, or *support* of the NATIONAL FORCES."

This statement, Hamilton says, —

"Rests upon two axioms, simple as they are universal: the *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of the *end* is expected, ought to possess the *means* by which it is to be attained." †

The doctrine of the Supreme Court of the United States, announced by Chief Justice Marshall, and approved by Daniel Webster, Chancellor Kent, and Judge Story, is thus stated: —

"The government of the United States is one of enumerated powers, and it can exercise only the powers granted to it; but though limited in its powers, it is supreme within its sphere of action. It is the government of the people of the United States, and emanated from them. Its powers were delegated by all, and it represents all, and acts for all.

"There is nothing in the constitution which excludes *incidental* or

* 3 Story's Commentaries, Sect. 122.

† Federalist, No. 23, pp. 95, 96.

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implied powers. The Articles of Confederation gave nothing to the United States but what was expressly granted; but the new constitution dropped the word *expressly*, and left the question whether a particular power was granted to depend on a fair construction of the whole instrument. No constitution can contain an accurate detail of all the subdivisions of its powers, and all the *means* by which they might be carried into execution. It would render it too prolix. Its nature requires that only the great outlines should be marked, and its important objects designated, and all the minor ingredients left to be deduced from the nature of those objects. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, were intrusted to the general government; and a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the people vitally depended, must also be intrusted with *ample means of their execution.* Unless the words imperiously require it, we ought not to adopt a construction which would impute to the framers of the constitution, when granting great powers for the public good, the intention of impeding their exercise by withholding a *choice of means.* The powers given to the government imply the ordinary means of execution; and the government, in all sound reason and fair interpretation, must have the choice of the means which it deems the most convenient and appropriate to the execution of the power. The constitution has not left the right of Congress to employ the necesssary means for the execution of its powers to general reasoning. Art. I, Sect. 8, of the constitution, expressly confers on Congress the power 'to make all laws that may be necessary and proper to carry into execution the foregoing powers.'

"Congress may employ such means and pass such laws as it may deem necessary to carry into execution great powers granted by the constitution; and *necessary* means, in the sense of the constitution, does not import an absolute physical necessity, so strong that one thing cannot exist without the other. It stands for any means calculated to produce the end. The word *necessary* admits of all degress of comparison. A thing may be necessary, or very necessary, or absolutely or indispensably necessary. The word is used in various senses, and in its construction the subject, the context, the intention, are all to be taken into view. The powers of the government were given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various *crises* in human affairs. To prescribe the specific means by which government should

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in all future time execute its power, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been foreseen dimly, and would deprive the legislature of the capacity to avail itself of experience, or to exercise its reason, and accommodate its legislation to circumstances. If the end be legitimate, and within the scope of the constitution, all means which are appropriate, and plainly adapted to this end, and which are not prohibited by the constitution, are lawful." *

Guided by these principles of interpretation, it is obvious that if the confiscation of property, or the liberation of slaves of rebels, be "plainly adapted to the end," — that is, to the suppression of rebellion, — it is within the power of Congress to pass laws for those purposes. Whether they are adapted to produce that result is for the legislature alone to decide. But, in considering the war powers conferred upon that department of government, a broad distinction is to be observed between confiscation or emancipation laws, passed in time of peace, for the punishment of crime, and similar laws, passed in time of war, to aid the President in suppressing rebellion, in carrying on a civil war, and in securing "the public welfare" and maintaining the "common defence" of the country. Congress may pass such laws in peace or in war as are within the general powers conferred on it, unless they fall within some express prohibition of the constitution. If confiscation or emancipation laws are enacted under the war powers of Congress, we must determine, in order to test their validity, whether, in suppressing a rebellion of colossal proportions, the United States are, within the meaning of the constitution, *at war* with its

* On the interpretation of constitutional power, see 1 Kent's Com. 351, 352; *McCulloch v. The State of Maryland*, 4 Wheat. R. 413–420.

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own citizens? whether confiscation and emancipation are sanctioned as belligerent rights by the law and usage of civilized nations? and whether our government has full belligerent rights against its rebellious subjects?

ARE THE UNITED STATES AT WAR?*

War may originate in either of several ways. The navy of a European nation may attack an American frigate in a remote sea. Hostilities then commence without any invasion of the soil of America, or any insurrection of its inhabitants. A foreign power may send troops into our territory with hostile intent, and without declaration of war; yet war would exist solely by this act of invasion. Congress, on one occasion, passed a resolution that "war existed by the act of Mexico;" but no declaration of war had been made by either belligerent. Civil war may commence either as a general armed insurrection of slaves, a servile war; or as an insurrection of their masters, a rebellion; or as an attempt, by a considerable portion of the subjects, to overthrow their government — which attempt, if successful, is termed a revolution. Civil war, within the meaning of the constitution, exists also whenever any combination of citizens is formed to resist generally the execution of any one or of all the laws of the United States, if accompanied with overt acts to give that resistance effect.

DECLARATION OF WAR NOT NECESSARY ON THE PART OF THE GOVERNMENT TO GIVE IT FULL BELLIGERENT POWERS.

A state of war may exist, arising in any of the modes above mentioned, without a declaration of war by either of the hostile parties. Congress has the sole power,

* *Note to the Forty-third Edition.* — See Twiss on the Law of Nations, pp. 65–69; and cases decided by the Supreme Court of the United States since the issue of the tenth edition. Appendix, pp. 512–610.

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under the constitution, to make that declaration, and to sanction or authorize the commencement of *offensive* war. The United States would ordinarily begin hostilities against a foreign nation by a public proclamation, which would be equivalent to a declaration of war. But this is quite a different case from a defensive or a civil war. The constitution establishes the mode in which this government shall *commence* wars, the authority which may authorize, and the declarations which shall precede, any act of hostility; but it has no power to prescribe the manner in which others should begin war against us. Hence it follows, that when war is commenced against this country by aliens or by citizens, no declaration of war by the government is necessary.* The fact that war is levied against the United States, makes it the duty of the President to call out the army or navy to subdue the enemy, whether foreign or domestic. The chief object of a declaration of war is to give notice thereof to neutrals, in order to fix their rights, and liabilities to the hostile powers, and to give to innocent parties reasonable time to withdraw their persons and property from danger. If the commander-in-chief could not call out his forces to repel an invasion unless the Legislative department had previously made a formal declaration of war, a foreign enemy, during a recess of Congress, might send out its armed cruisers to sweep our commerce from the seas, or it might cross our borders and march, unopposed, from Canada to the Gulf before a majority of our Representatives could be convened to make that declaration. The constitution, made as it was by men of sense, never leaves the nation powerless for self-defence. That instrument, which gives the legislature authority

* See opinion of the Supreme Court of the United States on this subject, pronounced since the fourth edition of this work was published. Notes on the War Powers, p. 141.

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to declare war, whenever war is *initiated* by the United States, also makes it the duty of the President, as commander-in-chief, to engage promptly and effectually in war; or, in other words, to make the United States a belligerent nation, without declaration of war, or any other act of Congress, whenever he is legally called upon to suppress rebellion, repel invasion, or to execute the laws against armed and forcible resistance thereto. The President has his duty, Congress have theirs; they are separate, and in some respects independent. Nothing is clearer than this, that when such a state of hostilities exists as justifies the President in calling the army into actual service, without the authority of Congress, no declaration of war is requisite, either in form or substance, for any purpose whatsoever. Hence it follows, that government, while engaged in suppressing a rebellion, is not deprived of the rights of a *belligerent against rebels*, by reason of the fact that no formal declaration of war has been made against them, as though they were an alien enemy, — nor by reason of the circumstance that this great civil war originated, so far as we are parties to it, in an effort to resist an armed attack of citizens upon the soldiers and the forts of the United States. It must not be forgotten that by the law of nations and by modern usage, no formal *declaration* of war *to the enemy* is made or deemed necessary.* All that is now requisite is for each nation to make suitable declarations or proclamations to its own citizens, to enable them to govern themselves accordingly. These have been made by the President.

HAS GOVERNMENT FULL WAR POWERS AGAINST REBEL CITIZENS?

Some persons have questioned the right of the United States to make and carry on war against citi-

* See 1 Kent's Com. p. 54.

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zens and subjects of this country. Conceding that the President may be authorized to call into active service the navy and army "to repel invasion, or suppress rebellion," they neither admit that suppressing rebellion places the country in the attitude of making war on rebels, nor that the commander-in-chief has the constitutional right of conducting his military operations as he might do if he were actually at war (in the ordinary sense of the term) against an alien enemy. Misapprehension of the meaning of the constitution on this subject has led to confusion in the views of some members of Congress during the last session, and has in no small degree emasculated the efforts of the majority in dealing with the questions of emancipation, confiscation, and enemy's property.*

Some have assumed that the United States are not *at war* with rebels, and that they have no authority to exercise the rights of war against them. They admit that the army has been lawfully called into the field, and may kill those who oppose it; they concede that rebels may be taken captive, their gunboats may be sunk, and their property may be seized; that martial law may be declared in rebellious districts, and its pains and penalties may be enforced; that every armed foe may be swept out of the country by military power. Yet they entertain a vague apprehension that something in the constitution takes away from these military proceedings, in suppressing rebellion and in resisting the attacks of the rebels, the quality and character of warfare. All these men in arms are not, they fancy, "*making war*." When the citizens of Charleston bombarded Fort Sumter, and captured property exclusively owned by the United States, it is not

* Reference is here made to the Session of 1861–2.

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denied that the enemy were waging war against the Union. When Major Anderson returned their fire and attempted to defend the fort and its guns from capture, it is denied that the Union was waging war against the enemy. While other nations, as well as our own, have formally or informally conceded to the rebels the character and the rights usually allowed to belligerents, that is, to persons making war on us, we, according to the technical scruple above stated, are not entitled to the rights of belligerents against them. It therefore becomes important to define the meaning of the term "levying war." As the military forces of this country are now in actual service to suppress rebellion, is such military service "*making war*" upon the rebels? And if war actually exists, is there anything in the constitution that limits or controls the full enjoyment and exercise by the government of the rights of a belligerent against the insurgents?

IS SUPPRESSING REBELLION BY ARMS MAKING WAR ON CITIZENS OF THE UNITED STATES?

To repel invasion by arms, all admit, is entering upon defensive war against the invader. War exists wherever and whenever the army or navy is in active service against a public enemy. When *rebels*, having organized themselves in armies, in large numbers, overthrow their lawful governments, invade the territory of States not consenting thereto, attack our citizens and soldiers, seize and confiscate the property not of our government only, but of all persons who continue loyal, such proceedings constitute a civil war in all its terrors, a war of subjugation and of conquest, as well as of rebellion. Operations less bloody

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and less revolutionary than there are held to constitute the levying of war, as those terms are explained in the language of the constitution. War is levied against the United States wherever and whenever the crime of *treason* is committed (see Constitution, Art. III., Sect. 3, Cl. 3), and under that clause, as interpreted by the Supreme Court, "*war is levied*" when there exists a combination, resorting to overt acts, to oppose generally the execution of any law of the United States, even if no *armed* force be used. The language of the Constitution is clear and express. "Treason shall consist only in levying war upon the United States, or in giving aid and comfort to the enemy." If, therefore, any person, or collection of persons, have committed the crime of treason, the constitution declares them to have *levied war*. As *traitors* they have become belligerent, or war levying enemies.

War may be waged *against* the government or *by* the government; it may be either offensive or defensive. Wherever war exists there must be two parties to it. If traitors (belligerents by the terms of the constitution) are one party, the government is the other party. If, when treason is committed, any body is at war, then it follows that the United States are at war. The inhabitants of a section of this country have issued a manifesto claiming independence; they have commenced hostilities on land and sea to maintain it; they have invaded territory of peaceful and loyal sections of the Union; they have seized and confiscated ships, arsenals, arms, forts, public and private property of our government and people, and have killed, captured, and imprisoned soldiers and private citizens. Of the million of

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men in arms, are those on one side levying war, and are those opposed to them *not* levying war?

As it takes two parties to carry on war, either party may begin it. That party which begins usually declares war. But when it is actually begun, the party attacked is as much at war as the party who made the attack. The United States are AT WAR with rebels, in the strictly legal and constitutional sense of the term, and have therefore all the rights against them which follow from a state of *war*, in addition to those which are derived from the fact that the rebels are also subjects.

REBELS MAY BE TREATED AS BELLIGERENTS AND AS SUBJECTS.

Wars may be divided into two classes, foreign and civil. In all civil wars the government claims the belligerents, on both sides, as subjects, and has the legal right to treat the insurgents both as subjects and as belligerents; and they therefore may exercise the full and untrammelled powers of war against their subjects, or they may, in their discretion, relieve them from any of the pains and penalties attached to either of these characters.* The right of a country to treat its rebellious citizens *both as belligerents and as subjects* has long been recognized in Europe, and by the Supreme Court of the United States.† In the civil war between St. Domingo and France, such rights were exercised, and were recognized as legitimate in *Rose* v. *Himely*, 4 Cranch, 272. So in *Cherriot* v. *Foussatt*, 3 Binney, 252. In *Dobrie* v. *Napier*, 3 Scott R. 225, it was held that a blockade of the coast of Portugal, by the Queen of that country, was lawful, and a vessel was condemned as a *lawful prize* for running the blockade. The cases

* *Note to the Forty-third Edition.* — See *Mauran* v. *Insurance Company*, 6 Wallace, 14, and other cases recently decided by the Supreme Court; also Note on "The Right of Capture of Enemy's Property," p. 451.

† See Note A, p. 215.

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of the *Santisima Trinidad*, 7 Wheat. 306, and *United States* v. *Palmer*, 3 W. 635, confirm this doctrine. By the terms of the constitution defining treason, a traitor *must be a subject and a belligerent*, and none but a belligerent subject can be a traitor.

The government have in fact treated the insurgents *as belligerents* on several occasions, without recognizing them in express terms as such. They have received the capitulation of rebels at Hatteras, as prisoners of war, *in express terms*, and have exchanged prisoners of war as such, and have blockaded the coast by military authority, and have officially informed other nations of such blockade, and of their intention to make it effective, under the present law of nations. They have not exercised their undoubted right to repeal the laws making either of the blockaded harbors ports of entry. They have relied solely on their *belligerent* rights, under the law of nations.*

Having thus the full powers and right of making and carrying on war against rebels, both as subjects and as belligerents, this *right* frees the President and Congress from the difficulties which might arise if rebels could be treated *only* as SUBJECTS, and if *war* could not be waged upon them. If conceding to rebels the privileges of belligerents should relieve them from some of the harsher penalties of treason, it will subject them to the liabilities of the belligerent character. The privileges and the disadvantages are correlative. But it is by no means conceded that the government may not exercise the right of treating the same rebels both as subjects and as belligerents. The constitution

* *Note to the Forty-third Edition.* — See cases decided in the Supreme Court, printed in the Appendix. See Note A, p. 215. Also, *The Revere*, 24 Law Rep. 276; *Amy Warwick*, Ib. 335–394; *The Brilliant*, 11 Am. Law Rep. 334; S. C. 2 Black. 635; *Cole* v. *Mer. Mut. Ins. Co.* 13 Am. Law Reg. 27; *Hiawatha*, 18 Leg. Int. 232; *The F. W. Johnson*, Ib. 334; also, Note on the "Right of Capture," p. 451.

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defines a rebel who commits treason as one who "levies war" on the United States; and the laws punish this highest of crimes with death, thus expressly treating the same person *as subject and as belligerent.* Those who save their necks from the halter by claiming to be treated as prisoners of war, and so protect themselves under the shield of belligerent rights, must bear the weight of that shield, and submit to the legal consequences of the character they claim. They cannot sail under two flags at the same time. But a rebel does not cease to be a subject because he has turned traitor. The constitution expressly authorizes Congress to pass laws to punish traitor—that is, belligerent—subjects; and suppressing rebellion by armed force is making war. Therefore the war powers of government give full belligerent rights against rebels in arms.

THE LAW OF NATIONS IS ABOVE THE CONSTITUTION.*

Having shown that the United States being actually engaged in civil war,—in other words, having become a belligerent power, without formal declaration of war,—it is important to ascertain what some of the *rights* of *belligerents* are, according to the law of nations. It will be observed that the law of nations is above the constitution of any government; and no people would be justified by its peculiar constitution in violating the rights of other nations. Thus, if it had been provided in the Articles of Confederation, or in the present constitution, that all citizens should have the inalienable right to practise the profession of *piracy* upon the ships and property of foreign nations, or that they should be lawfully empowered to make incursions into England, France, or other countries, and seize by force and bring

* *Note to Forty-third Edition.*—See *U. S.* v. *Moreno*, 1 Wallace, 400. Appendix, p. 531

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home such men and women as they should select, and, if these privileges should be put in practice, England and France would be justified in treating us as a nest of pirates, or a band of marauders and outlaws. The whole civilized world would turn against us, and we should justly be exterminated. An association or agreement on our part to violate the rights of others, by whatever name it may be designated, whether it be called a constitution, or league, or conspiracy, or a domestic institution, is no justification, under the law of nations, for illegal or immoral acts.

INTERNATIONAL BELLIGERENT RIGHTS ARE DETERMINED BY THE LAW OF NATIONS.

To determine what are the rights of different nations when making war upon each other, we look only to the law of nations. The peculiar forms or rights of the subjects of one of these war-making parties under their own government give them no rights over their enemy other than those which are sanctioned by international law. In the great tribunal of nations, there is a "higher law" than that which has been framed by either one of them, however sacred to each its own peculiar laws and constitution of government may be.

But while this supreme law is in full force, and is binding on all countries, softening the asperities of war, and guarding the rights of neutrals, it is not conceded that the government of the United States, in a civil war for the suppression of rebellion among its own citizens, is subject to the same limitations as though the rebels were a foreign nation, owing no allegiance to the country.

With this caveat, it will be desirable to state some of the rights of belligerents.

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BELLIGERENT RIGHTS OF THE GOVERNMENT.

Congress has power to make laws authorizing the capture of the property of public enemies on land and water; the confiscation of their real and personal estate; and the military government of the inhabitants of conquered territory.* As the property of all nations has an equal right upon the high seas (the highway of nations), in order to protect the commerce of neutrals from unlawful interference, it is necessary that ships and cargoes seized on the ocean should be brought before some prize court, that it may be judicially determined whether the captured vessel and cargo were, in whole or in part, enemy's property or contraband of war. The decision of any prize court, according to the law of nations, is conclusive against all the world. Where personal property of the enemy is captured from the enemy, on land, in the enemy's country, no decision of any court is necessary to give a title thereto.† Capture passes the title. This is familiar law as administered in the courts of Europe and America. ‡

BELLIGERENT RIGHTS CONFIRMED BY THE CONSTITUTION.

Some persons have questioned whether title passes in this country by capture or confiscation, by reason of some of the limiting clauses of the constitution; and others have gone so far as to assert that all the proceedings under martial law, such as capturing enemy's property, imprisonment of spies and traitors, and seizures of articles contraband of war, and suspending the *habeas corpus*, are

* See Stat. 1861, chap. 60. Also the case of *Armstrong's Foundry*, 6 Wallace, 769; *United States* v. *Republican Banner Office*, 11 Pitts, Leg. Jour. 153.

† See *Note to Forty-third Edition*, p. 459. — This distinction between prize and capture has been recognized (1865) by the Supreme Court. See *The Peterhoff*, p. 582. In *The Battle* 6 Wallace, 498, the court say (1867), "Capture as prize of war *jure belli* overrides all previous liens." See also *Coolidge* v. *Guthrie*, p. 591.

‡ *Alexander* v. *Duke of Wellington*, 2 Russ. & Mylne, 35. Lord Brougham said that military prize rests upon the same principles of law as prize at sea, though in general no statute passes with respect to it. See 1 Kent's Comm. 357.

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in violation of the constitution, which declares that no man shall be deprived of life, liberty, or property without due process of law;* that private property shall not be taken for public use without just compensation;† that unreasonable searches and seizures shall not be made;‡ that freedom of speech and of the press shall not be abridged;§ and that the right of the people to keep and bear arms shall not be infringed.||

THESE PROVISIONS NOT APPLICABLE TO A STATE OF WAR.

If these rules are applicable to a state of war, then capture of property is illegal, and does not pass a title; no defensive war can be carried on; no rebellion can be suppressed; no invasion can be repelled; the army of the United States, when called into the field, can do no act of hostility. Not a gun can be fired *constitutionally*, because it might deprive a rebel foe of his life without *due process of law* — firing guns not being deemed "due process of law."

Sect. 4 of Art. IV. says, that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence."

Art. I. Sect. 8, gives Congress power to declare war, raise and support armies, provide and maintain a navy; to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be in the service of the United States.

* Constitutional Amendments, Art. V. † Ibid. Art. V.
‡ Ibid. Art. IV. § Ibid. Art. I. || Ibid. Art. II.

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If these rules above cited have any application in a time of war, the United States *cannot protect* each of the States from invasion by citizens of other States, nor against domestic violence; nor can the army, or militia, or navy be used for any of the purposes for which the constitution authorizes or requires their employment. If all men have the right to "keep and bear arms," what right has the army of the Union to take them away from rebels? If "no one can constitutionally be deprived of life, liberty, or property, without due process of law," by what right does government seize and imprison traitors? By what right does the army kill rebels in arms, or burn up their military stores? If the only way of dealing constitutionally with rebels in arms is to go to law with them, the President should convert his army into lawyers, justices of the peace, and constables, and serve "summonses to appear and answer to complaints," instead of a summons to surrender. He should send "GREETINGS" instead of sending rifle shot. He should load his caissons with "pleas in abatement and demurrers," instead of thirty-two pound shell and grape shot. In short, he should levy writs of execution, instead of levying war. On the contrary, the commander-in-chief proposes a different application of the due process of law. His summons is, that rebels should lay down their arms; his pleas are batteries and gunboats; his arguments are hot shot, and always "to the point;" and when his fearful execution is "levied on the body," all that is left will be for the undertaker.

TRUE APPLICATION OF THESE CONSTITUTIONAL GUARANTEES.

The clauses which have been cited from the amendments to the constitution were intended as declarations

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of the rights of peaceful and loyal citizens, and safeguards in the administration of justice by the civil tribunals; but it was necessary, in order to give the government the means of defending itself against domestic or foreign enemies, to maintain its authority and dignity, and to enforce obedience to its laws, that it should have unlimited war powers; and it must not be forgotten that the same authority which provides those safeguards, and guarantees those rights, also imposes upon the President and Congress the duty of so carrying on war as of necessity to supersede and hold in temporary suspense such civil rights as may prove inconsistent with the complete and effectual exercise of such war powers, and of the belligerent rights resulting from them. The rights of war and the rights of peace cannot coexist. One must yield to the other. Martial law and civil law cannot operate at the same time and place upon the same subject matter. Hence the constitution is framed with full recognition of that fact; it protects the citizen in peace and in war; but his rights enjoyed under the constitution, in time of peace are different from those to which he is entitled in time of war.

CIVIL RIGHTS OF LOYAL CITIZENS IN LOYAL DISTRICTS ARE MODIFIED BY THE EXISTENCE OF WAR.

While war is raging, many of the rights held sacred by the constitution — rights which cannot be violated by any acts of Congress — may and must be suspended and held in abeyance. If this were not so, the government might itself be destroyed; the army and navy might be sacrificed, and one part of the constitution would NULLIFY the rest.

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If *freedom of speech* cannot be suppressed, spies cannot be caught, imprisoned, and hung.

If *freedom of the press* cannot be interfered with, all our military plans may be betrayed to the enemy.

If no man can be *deprived of life without trial by jury*, a soldier cannot slay the enemy in battle.

If *enemy's property* cannot be taken without "due process of law," how can the soldier disarm his foe and seize his weapons?

If no person can be arrested, sentenced, and shot, without *trial by jury* in the county or State where his crime is alleged to have been committed, how can a *deserter be shot*, or a *spy be hung*, or an *enemy be taken prisoner?*

It has been said that "*amidst arms* the *laws are silent.*" It would be more just to say, that while war rages, the *rights*, which in peace are sacred, must and do give way to the higher right, the right of public safety, the right which the country, the whole country, claims to protection from its enemies, domestic and foreign, from spies, from conspirators, and from traitors.* The sovereign and almost dictatorial military powers, existing only in actual war, ending when war ends, to be used in self-defence, and to be laid down when no longer necessary, are, while they last, as lawful, as constitutional, as sacred, as the administration of justice by judicial courts in time of peace. They may be dangerous; war itself is dangerous; but danger does not make them *unconstitutional.* If the commander-in-chief orders his soldiers to seize the arms and ammunition of

* "Among absolute international rights, one of the most essential and important, and that which lies at the root of all the rest, is the right of self-preservation. It is not only a right in respect to other States, but it is a duty in respect to its own members, and the most solemn and important which a State owes to them." — *Wheaton*, pp. 115, 116.

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the rebels; to capture their persons; to shell out their batteries; to hang spies or shoot deserters; to destroy insurgents waging open battle; to send traitors to forts and prisons; to stop the press from aiding and comforting the enemy by betraying our military plans; to arrest within our lines, or wherever they can be seized, persons against whom there is reasonable evidence of their having aided or abetted the rebels, or of intending so to do, the pretension that he thereby violates the constitution is not only erroneous, but it is a plea in behalf of treason. To set up the rules of civil administration as overriding and controlling the laws of war, is to aid and abet the enemy. It falsifies the clear meaning of the constitution, which not only gives the power, but makes it the plain duty of the President, to wage war, when lawfully declared or recognized, against the public enemy of his country. The restraints to which he is subject, when in war, are not found in municipal regulations, which can be administered only in peace, but in the laws and usages of nations regulating the conduct of war.

WHETHER BELLIGERENTS SHALL BE ALLOWED CIVIL RIGHTS UNDER THE CONSTITUTION DEPENDS UPON THE POLICY OF GOVERNMENT.*

None of these rights, guaranteed to peaceful citizens, by the constitution belong to them after they have become belligerents against their own government. They thereby forfeit all protection under that sacred charter which they have thus sought to overthrow and destroy. One party to a contract cannot break it and at the same time hold the other to perform it. It is true that if the govern-

* See Note to Forty-third Edition, p. 425, and Index, title "Civil Rights."

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ment elects to treat them as subjects and to hold them liable only to penalties for violating statutes, it must concede to them all the legal rights and privileges which other citizens would have when under similar accusations; and Congress must be limited to the provisions of the constitution in legislation against them as citizens. But the fact that war is waged by these miscreants releases the government from all obligation to make that concession, or to respect the rights to life, liberty, or property of its enemy, because the constitution makes it the duty of the President to prosecute war against them in order to suppress rebellion and repel invasion.

THE CONSTITUTION ALLOWS CAPTURE AND CONFISCATION.

Nothing in the constitution interferes with the belligerent right of confiscation of enemy property. The right to confiscate is derived from a state of war. It is one of the rights of war. It originates in the principle of self-preservation. It is the means of weakening the enemy and strengthening ourselves. The right of confiscation belongs to the government as the necessary consequence of the power and duty of making war — offensive or defensive. Every capture of enemy ammunition or arms is, in substance, a confiscation, without its formalities. To deny the right of confiscation is to deny the right to make war, or to conquer an enemy.

If authority were needed to support the right of confiscation, it may be found in 3 Dallas, 227; Vat. lib. iii., ch. 8, sect. 188; lib. iii., ch. 9, sect. 161; *Smith* v. *Mansfield*, Cranch, 306–7; *Cooper* v. *Telfair*, 4 Dallas; *Brown* v. *U. S.*, 8 Cranch, 110, 228, 229.

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The following extract is from 1 Kent's Com., p. 59: —

"But however strong the current of authority in favor of the modern and milder construction of the rule of national law on this subject, the point seems to be no longer open for discussion in this country; and it has become definitively settled in favor of the ancient and sterner rule by the Supreme Court of the United States. *Brown* v. *United States*, 8 Cranch, 110; ibid. 228, 229.

"The effect of war on British property found in the United States on land, at the commencement of the war, was learnedly discussed and thoroughly considered in the case of Brown, and the Circuit Court of the United States at Boston decided as upon a settled rule of the law of nations, that the goods of the enemy found in the country, and all vessels and cargoes found afloat in our ports at the commencement of hostilities, were liable to seizure and confiscation; and the exercise of the right vested in the discretion of the sovereign of the nation.

"When the case was brought up on appeal before the Supreme Court of the United States, the broad principle was assumed that war gave to the sovereign the full right to take the persons and confiscate the property of the enemy wherever found; and that the mitigations of this rigid rule, which the wise and humane policy of modern times had introduced into practice, might, more or less, affect the exercise of the right, but could not impair the right itself.

"Commercial nations have always considerable property in possession of their neighbors; and when war breaks out, the question, What shall be done with enemy property found in the country? is one rather of policy than of law, and is one properly addressed to the consideration of the legislature, and not to the courts of law.

"The strict right of confiscation of that species of property existed in Congress, and without a legislative act authorizing its confiscation it could not be judicially condemned; and the act of Congress of 1812 declaring war against Great Britain was not such an act. Until some statute directly applying to the subject be passed, the property would continue under the protection of the law, and might be claimed by the British owner at the restoration of peace.

"Though this decision established the right contrary to much of modern authority and practice, yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right depend upon a special act of Congress."

From the foregoing authorities, it is evident that the

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government has a right, as a belligerent power, to capture or to confiscate any and all the personal property of the enemy; that there is nothing in the constitution which limits or controls the exercise of that right; and that capture in war, or confiscation by law, passes a complete title to the property taken; and that, if *judicial* condemnation of enemy property be sought, in order to pass the title to it by formal decree of courts, by mere seizure, and without capture, the confiscation must have been declared by act of Congress, a mere declaration of war not being *ex vi termini* sufficient for that purpose. The army of the Union, therefore, have the right, according to the law of nations, and of the constitution, to obtain by capture a legal title to all the personal property of the enemy they get possession of, whether it consist of arms, ammunition, provisions, slaves, or any other thing which the law treats as personal property. No judicial process is necessary to give the government full title thereto, and when once captured, the government may dispose of the property as absolute owner thereof, in the same manner as though the title passed by bill of sale: and Congress have plenary authority to pass such confiscation laws against belligerent enemies as they deem for the public good.

A SEVERE RULE OF BELLIGERENT LAW.

"Property of persons residing in the enemy's country is deemed, in law, hostile, and subject to condemnation without any evidence as to the opinions or predilections of the owner." If he is the subject of a neutral, or a citizen of one of the belligerent States, and has expressed no disloyal sentiments towards his country,

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still his residence in the enemy's country impresses upon his property, engaged in commerce and found upon the ocean, a hostile character, and subjects it to condemnation. This familiar principle of law is sanctioned in the highest courts of England and of the United States, and has been decided to apply to cases of *civil* as well as of foreign war.*

Thus personal property of every kind, ammunition, provisions, contraband, or slaves, may be lawfully seized, whether of *loyal* or *disloyal* citizens, and is by law *presumed hostile*, and liable to *condemnation*, if *captured within the rebellious districts*. This right of seizure and condemnation is harsh, as all the proceedings of war are harsh, in the extreme, but it is nevertheless lawful. It would be harsh to kill in battle a loyal citizen who, having been impressed into the ranks of the rebels, is made to fight against his country; yet it is lawful to do so.

Against all persons in arms, and against all property situated and seized in rebellious districts, the laws of war give the government full belligerent rights; and when the army and navy are once lawfully called out, there are no limits to the war-making power of the President, other than the law of nations, and such rules as Congress may pass for their regulation.†

"The statute of 1807, chap. 39," says a learned judge, "provides that whenever it is lawful for the President to call forth the militia to suppress an insurrection, he may employ the land and naval forces for that purpose. The authority to use the army is thus expressly con-

* *The Venus*, 8 Cranch Rep.; *The Hoop*, 1 Robinson, 196, and cases there cited. *The Amy Warwick*, opinion of Judge Sprague.

† See Notes to Forty-third Edition, title "War Powers," pp. 390–392; and cases in the Appendix.

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firmed, but the *manner* in which they are to be used is not prescribed. That is left to the discretion of the President, guided by the usages and principles of civilized war."

As a matter of expediency, Congress may direct that *no* property of *loyal citizens*, residing in *disloyal* States, should be seized by military force, without compensation. This is an act of grace, which, though not required by the *laws of war*, may well be granted. The commander-in-chief may also grant the same indulgence. But the military commanders are always at liberty to seize, in an enemy's country, whatever property they deem necessary for the sustenance of troops, or military stores, whether it is the property of friend or enemy; it being usual, however, to pay for all that is taken from friends. These doctrines have been carried into effect in Missouri.*

The President having adopted the policy of protecting loyal citizens wherever they may be found, all seizure of their property, and all interference with them have so far been forborne. But it should be understood that such forbearance is optional, not compulsory. It is done from a sense of justice and humanity, not because law or constitution renders it inevitable. And this forbearance is not likely to be carried to such an extent as to endanger the success of the armies of the Union, nor to despoil them of the legitimate fruits of victory over rebels.

BELLIGERENT RIGHT TO CONFISCATE ENEMY'S REAL ESTATE.

The *belligerent right* of the government to confiscate *enemy's real estate, situated in this country*, can hardly admit

* See Note to Forty-third Edition, title "Capture," p. 451; "Slaves in the Army," p. 405.

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of a question. The title to no inconsiderable part of the real estate in each of the original States of the Union, rests upon the validity of confiscation acts, passed by our ancestors against loyal adherents to the crown. Probably none of these States failed to pass and apply these laws. English and American acts of confiscation were recognized by the laws of both countries, and their operation modified by treaties; their *validity never was denied.* The *only* authority which either of the States or colonies ever had for passing such laws was derived from the fact that they were *belligerents.*

It will be observed that the question as to the belligerent right to confiscate enemy's real estate situated in the United States, is somewhat different from the question whether in conquering a foreign country it will be lawful to confiscate the private real estate of the enemy.

It is *unusual,* in case of *conquest* of a foreign country, for the conqueror to do more than to displace its sovereign, and assume dominion over the country. On a *mere* change of *sovereignty* of the country, it would be harsh and severe to confiscate the private property and annul the private rights of citizens generally. And *mere* conquest of a country does not *of itself* operate as confiscation of enemy's property; nor does the cession of a country by one nation to another destroy private rights of property, or operate as confiscation of personal or real estate.* So it was held by the Supreme Court in the case of the transfer by treaty of Florida to the United States; but it was specially provided in that treaty that private property should not be inter-

* *United States* v. *Juan Richmond,* 7 Peters, 51.

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fered with. The forbearance of a conqueror from confiscating the entire property of a conquered people is usually founded in good policy, as well as in humanity. The object of foreign conquest is to acquire a permanent addition to the power and territory of the conqueror. This object would be defeated by stripping his subjects of every thing. The case is very different where confiscation will only break up a nest of traitors, and drive them away from a country they have betrayed.

Suppose that certain Englishmen owned large tracts of real estate in either of the United States or territories thereof, and war should break out; would any one doubt the right of Congress to pass a law confiscating such estate?

The laws of nations allow either belligerent to seize and appropriate whatever property of the enemy it can gain possession of; and, of all descriptions of property which government could safely permit to be owned or occupied by an alien enemy, real estate within its own dominion would be the last.

No distinction can be properly or legally made between the different kinds of enemy property, whether real, personal, or mixed, so far as regards their liability to confiscation by the war power. Lands, money, slaves, debts, may and have been subject to this liability. The methods of appropriating and holding them are different — the result is the same. And, considering the foundation of the right, the object for which it is to be exercised, and the effects resulting from it, there is nothing in law, or in reason, which would indicate why one can and the other cannot be taken away from the enemy.

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In *Brown* v. *United States*, 8 Cranch, p. 123, the Supreme Court of the United States say, —

"Respecting the power of government, no doubt is entertained. That war gives to the sovereign the full right to take the persons and confiscate the property of the enemy, wherever found, is conceded. The mitigations of this rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself — that remains undiminished; and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will."

"It may be considered," they say, "as the opinion of all who have written on the *jus belli*, that war gives the *right* to confiscate," &c.

Chancellor Kent says, —

"When war is duly declared, it is not merely a war between this and the adverse government in their political characters. Every man is, in judgment of law, a party to the acts of his own government, and a war between the government of two nations is a war between all the individuals of the one and all the individuals of which the other nation is composed. Government is the representative of the will of the people, and acts for the whole society. This is the theory of all governments, and the best writers on the law of nations concur in the doctrine, that when the sovereign of a state declares war against another sovereign, it implies that the whole nation declares war, and that all the subjects of the one are enemies to all the subjects of the other."

"Very important consequences concerning the obligations of subjects are deducible from this principle. When hostilities have commenced, the first objects that present themselves for detention and capture are the persons and property of the enemy found within the territory on the breaking out of war. According to strict authority, a state has a right to deal as an enemy with persons and property so found within its power, and to confiscate the property and detain the persons as prisoners of war." *

* 1 Kent's Com., p. 55. See also Grotius, B. III. ch. 3, sect. 9; ch. 4, sect. 8. Burlamaqui, Part IV. ch. 4, sect. 20. Vattel, B. III. ch. 5, sect. 70.

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We thus see, that by the law of nations, by the practice of our own States, by the decisions of courts, by the highest authority of legal writers, and by the deductions of reason, there can be no question of the constitutional right of confiscation of enemy real estate of which we may gain possession. And the legal presumption that real estate situated in rebellious districts is enemy property, would seem to be as well founded as it is in case of personal property.†

It is for the government to decide how it shall use its belligerent right of confiscation. The number of slaveholders in the rebellious States, who are the principal land owners in that region, and who are the chief authors and supporters of this rebellion, constitute, all told, less than *one in one hundred and twenty eight* of the people of the United States, and less than *one fiftieth* part of the inhabitants of their own districts, being far less in proportion to the whole population of the country than the *old tories* in the time of the revolution were to the colonists.‡

MILITARY GOVERNMENT UNDER MARTIAL LAW.

In addition to the right of confiscating the property of the enemy, a state of war also confers upon the government other not less important belligerent rights, and among them, the right to seize and hold conquered territory by military force, and of instituting and maintaining military government over it, thereby suspending in part, or in the whole, the ordinary civil administration. The exercise of this right has been sanctioned by the decision of the Supreme Court of the United

† See page 59.

‡ In confirmation of these views of the War Powers of Congress, see the chapter on the War Powers of the President, and Notes thereon.

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States, in the case of California.* And it is founded upon well-established doctrines of the law of nations. Without the right to make laws and administer justice in conquered territory, the inhabitants would be plunged into anarchy. The old government being overthrown, and no new one being established, there would be none to whom allegiance would be due — none to restrain lawlessness, none to secure to any persons any civil rights whatever. Hence, from the necessity of the case, the conqueror has power to establish a quasi military civil administration of government for the protection of the innocent, the restraint of the wicked, and the security of that conquest for which war has been waged.†

It is under this power of holding and establishing military rule over conquered territory, that all provisional governments are instituted by conquerors. The President, as commander-in-chief, has formally appointed Andrew Johnson governor of Tennessee, with all the powers, duties, and functions pertaining to that office, during the pleasure of the President, or until the *loyal* inhabitants of that State shall organize a civil government in accordance with the constitution of the United States. To legalize these powers and duties, it became expedient to give him a military position; hence he was nominated as a brigadier general, and his nomination was confirmed by the Senate. Mr. Stanley acts as provisional military governor of North Carolina, under similar authority.‡ All acts of military government which are within the scope of their author-

* *Cross* v. *Harrison*, 16 How. 164-190.

† See *Fleming* v. *Page*, 9 How. 615. *Leitensdorfer* v. *Webb*, 20 How. 177. As to California, see Stat. at Large, vol. ix. p. 452. New Mexico, Stat. at Large, ibid. 446. Halleck on International Law, 781. Story on Const., Sec. 1324. *Am. Ins. Co.* v. *Canter*, 1 Pet. S. C. R. 542, 543.

‡ When this essay was first published (1862), Mr. Stanley and Mr. Johnson were in office.

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ity, are as legal and constitutional as any other military proceeding. Hence any section of this country, which, having joined in a general rebellion, shall have been *subdued* and conquered by the military forces of the United States, may be subjected to military government, and the rights of citizens in those districts are subject to martial law, so long as the war lasts. Whatever of their rights of property are *lost* in and by the war, are lost forever. No citizen, whether loyal or rebel, is deprived of any right guaranteed to him in the constitution by reason of his subjection to *martial law*, because *martial law*, when in force, is *constitutional law*. The people of the United States, through their lawfully chosen commander-in-chief, have the constitutional right to seize and hold the territory of a belligerent enemy, and to govern it by martial law, thereby superseding the local government of the place, and all rights which rebels might have had as citizens of the United States, if they had not violated the laws of the land by making war upon the country.

By martial law, loyal citizens may be for a time debarred from enjoying the rights they would be entitled to in time of peace. Individual rights must always be held subject to the exigencies of national safety.

In war, when *martial law is in force*, the laws of war are the laws which the constitution expressly authorizes and requires to be enforced. The constitution, when it calls into action martial law, for the time changes *civil* rights, or rights which the citizen would be entitled to in peace, because the rights of persons in one of these cases are totally incompatible with the obligations of persons in the other. Peace and war cannot exist

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together; the laws of peace and of war cannot operate together; the rights and procedures of peaceful times are incompatible with those of war. It is an obvious but pernicious error to suppose that in a *state of war*, the rules of martial law, and the consequent modification of the rights, duties, and obligations of citizens, private and public, are not *authorized* strictly under the *constitution*. And among the rights of martial law, none is more familiar than that of seizing and establishing a military government over territory taken from the enemy; and the duty of thus protecting such territory is imperative, since the United States are obligated to guarantee to each State a republican form of government.* That form of government having been overthrown by force, the country must take such steps, military and civil, as may tend to restore it to the loyal citizens of that State, if there be any; and if there be no persons who will submit to the constitution and laws of the United States, it is their duty to hold that State by military power, and under military rule, until loyal citizens shall appear there in sufficient numbers to entitle them to receive back into their own hands the local government.†

* Constitution, Art. IV. Sect. 4, Cl. 1.

† *Note to Forty-third Edition.* — Since the issue of the tenth edition of this book, in 1864, Congress has sanctioned and actually used the powers claimed on pages 62-65 as rightfully belonging to it, by passing the Freedman's Bureau Act, March 3, 1865, and the Reconstruction Acts, March 2, 1867, June 22, 1868 (chap. 69), June 25, 1868 (chap. 70); and the Supreme Court has decided the case of *Georgia* v. *Stanton*. See Notes on these subjects.

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CHAPTER III.

WAR POWER OF THE PRESIDENT TO EMANCIPATE SLAVES.

THE power of the President, as commander-in-chief of the army and navy of the United States, when in actual service, to emancipate the slaves of any belligerent section of the country, if such a measure becomes necessary to save the government from destruction, is not, it is presumed, denied by any respectable authority.*

WHY THE POWER EXISTS.

The liberation of slaves is looked upon as a means of embarrassing or weakening the enemy, or of strengthening the military power of our army. If slaves be treated as contraband of war, on the ground that they may be used by their masters to aid in prosecuting war, as employees upon military works, or as laborers furnishing by their industry the means of carrying on hostilities; or if they be treated as, in law, belligerents, following the legal condition of their owners; or if they be deemed loyal subjects having a just claim upon the government to be released from their obligations to give aid and service to disloyal and belligerent masters, in order that they may be free to perform their higher duty of allegiance and loyalty to the United States; or if they be regarded as subjects

* It has been shown in a previous chapter that the government has a right to treat *rebels* either as *belligerents* or as subjects, and to subject them to the severities of international belligerent law.

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of the United States, liable to do military duty; or if they be made citizens of the United States, and soldiers; or if the authority of the masters over their slaves is the means of aiding and comforting the enemy, or of throwing impediments in the way of the government, or depriving it of such aid and assistance in successful prosecution of the war, as slaves would and could afford, if released from the control of the enemy, — or if releasing the slaves would embarrass the enemy, and make it more difficult for them to collect and maintain large armies; in either of these cases, the taking away of these slaves from the "aid and service" of the enemy, and putting them to the aid and service of the United States, is justifiable as an act of war. The ordinary way of depriving the enemy of slaves is by declaring emancipation.

THE PRESIDENT IS THE SOLE JUDGE.

"It belongs exclusively to the President to judge when the exigency arises in which he has authority, under the constitution, to call forth the militia, and his decision is conclusive on all other persons." *

The constitution confers on the Executive, when in actual war, full belligerent powers. The emancipation of enemy's slaves is a belligerent right. It belongs exclusively to the President, as commander-in-chief, to judge whether he shall exercise his belligerent right to emancipate slaves in those parts of the country which are in rebellion. If exercised in fact, and while the war lasts, his act of emancipation is conclusive and

* Such is the language of Chief Justice Taney, in delivering the opinion of the Supreme Court, in *Martin* v. *Mott*, 12 Wheaton, 19.

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binding forever on all the departments of government, and on all persons whatsoever.

POWERS OF THE PRESIDENT NOT INCONSISTENT WITH POWERS OF CONGRESS TO EMANCIPATE SLAVES.

The right of the Executive to strike this blow against his enemy does not deprive Congress of the concurrent right or duty to emancipate enemy's slaves, if in *their judgment* a civil act for that purpose is required by public welfare and common defence, for the purpose of aiding and giving effect to such war measures as the commander-in-chief may adopt.

The military authority of the President is not incompatible with the peace or war powers of Congress; but both coexist, and may be exercised upon the same subject. Thus, when the army captures a regiment of soldiers, the legislature may pass laws relating to the captives. So may Congress destroy slavery by abolishing the laws which sustain it, while the commander of the army may destroy it by capture of slaves, by proclamation, or by other means.

IS LIBERATION OF ENEMY'S SLAVES A BELLIGERENT RIGHT?

This is the chief inquiry on this branch of the subject. To answer it we must appeal to the law of nations, and learn whether there is any commanding authority which forbids the use of an engine so powerful and so formidable — an engine which may grind to powder the disloyalty of rebels in arms, while it clears the avenue to freedom for four millions of Americans. It is only the law of nations that can decide this question, because the constitution, having given authority to government to make war, has placed no limit what-

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ever to the war powers. There is, therefore, no legal control over the war powers except the law of nations, and no moral control except the usage of modern civilized belligerents.

THE LAW OF NATIONS SANCTIONS EMANCIPATION OF ENEMY'S SLAVES.

It is in accordance with the law of nations and with the practice of civilized belligerents in modern times, to liberate enemy's slaves in time of war by military power. In the revolutionary war, England exercised that unquestioned right by not less than three of her military commanders — Sir Henry Clinton, Lord Dunmore, and Lord Cornwallis. That General Washington recognized and feared Lord Dunmore's appeal to the slaves, is shown by his letter on that subject.

"His strength," said Washington, "will increase as a snow-ball by rolling faster and faster, if some expedient cannot be hit upon to convince the slaves and servants of the impotency of his designs."

The right to call the slaves of colonists to the aid of the British arms was expressly admitted by Jefferson, in his letter to Dr. Gordon. In writing of the injury done to his estates by Cornwallis, he uses the following language: —

"He destroyed all my growing crops and tobacco; he burned all my barns, containing the same articles of last year. Having first taken what corn he wanted, he used, *as was to be expected*, all my stock of cattle, sheep, and hogs, for the sustenance of his army, and carried off all the horses capable of service. *He carried off also about thirty slaves. Had this been to give them freedom, he would have done right.* . . . From an estimate made at the time on the best information I could collect, I suppose the State of Virginia lost under Lord Cornwallis's hands, that year, about thirty thousand slaves."

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Great Britain, for the second time, used the same right against us in the war of 1812. Her naval and military commanders invited the slaves, by public proclamations, to repair to their standard, promising them freedom.* The slaves who went over to them were liberated, and were carried away contrary to the express terms of the treaty of Ghent, in which it was stipulated that they should not be carried away. England preferred to become liable for a breach of the treaty rather than to break faith with the fugitives. Indemnity for this violation of contract was demanded and refused. The question was referred to the decision of the Emperor of Russia, as arbitrator, who decided that indemnity should be paid by Great Britain, not because she had violated the law of nations in emancipating slaves, but because she had broken the terms of the treaty.

In the arguments submitted to the referee, the British government broadly asserted the belligerent right of liberating enemy's slaves, even if they were treated as private property. Mr. Middleton was instructed by Mr. J. Q. Adams, then, in 1820, Secretary of State, to deny that right, and to present reasons for that denial. But that in this instance he acted in obedience to the instructions of the President and cabinet, and against his own opinions on the law of nations, is shown by his subsequent statement in Congress to that effect.† The question of international law was left undecided by the Emperor; but the assertion of England, that it is a

* For Admiral Cochrane's Proclamation, instigating the slaves to desert their masters, see Niles's Register, vol. vi. p. 242.

† "It was utterly against my judgment and wishes; but I was obliged to submit, and prepared the requisite despatches." See Congressional Globe, XXVII. Cong., 2d sess., 1841-2; vol. ii. p. 424.

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legitimate exercise of belligerent rights to liberate enemy's slaves, — a right which had previously been enforced by her against the colonies, and by France against her, and again by her against the United States, — was entitled to great weight, as a reiterated and authentic reaffirmance of the well-settled doctrine.

In speeches before the House of Representatives on the 25th of May, 1836, on the 7th of June, 1841, and on the 14th and 15th of April, 1842, Mr. Adams explained and asserted in the amplest terms the powers of Congress, and the authority of the President, to free enemy's slaves, as a legitimate act of war.* Thus leading statesmen of England and America have concurred in the opinion that emancipation is a belligerent right.

St. Domingo, in 1793, contained more than five hundred thousand negroes, with many mulattoes and whites, and was held as a province of France. Intestine commotions had raged for nearly three years between the whites and mulattoes, in which the negroes had remained neutral. The Spaniards having effected an alliance with the slaves who had revolted in 1791, invaded the island and occupied several important military points. England, also, was making a treaty with the planters to invade the country; and thus the possession seemed about to be wrested from France by the efforts of one or the other of its two bitterest foes. One thousand French soldiers, a few mulattoes and loyal slaveholders, were all the force which could be mustered in favor of the government, for the protection of this precious island, situated so far away from France.

* For extracts from these speeches, see *postea*.

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Sonthonax and Polverel, the French commissioners, on the 29th of August, 1793, issued a proclamation, under martial law, wherein they declared all the slaves free, and thereby brought them over *en masse* to the support of the government. The English troops landed three weeks afterwards, and were repulsed principally by the slave army.

On the 4th of February, 1794, the National Convention of France confirmed the act of the commissioners, and also abolished slavery in the other French colonies.

In June, 1794, Toussaint L'Ouverture, a colored man, admitted by military critics to be one of the great generals of modern times, having until then fought in favor of Spain, brought his army of five thousand colored troops to the aid of France, forced entrance into the chief city of the island in which the French troops were beleaguered, relieved his allies, and offered himself and his army to the service of that government, which had guaranteed to them their freedom. From that hour the fortunes of the war changed. The English were expelled from the island in 1798; the Spaniards also gave it up; and in 1801 Toussaint proclaimed the republic in the Spanish portion of the island which had been ceded to France by the treaty of 1795; thus extending the practical operation of the decree of emancipation over the whole island, and liberating one hundred thousand more persons who had been slaves of Spaniards.

The island was put under martial law; the planters were recalled by Toussaint, and permitted to hire their former slaves; and his government was enforced by military power; and from that time until 1802, the progress of the people in commerce, industry, and gen-

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eral prosperity was rapid and satisfactory. But in 1802 the influence of emigrant planters, and of the Empress Josephine, a creole of Martinique, induced Napoleon to send a large army to the island, to reëstablish the slave trade and slavery in all the other islands except St. Domingo, with the design of restoring slavery there after he should have conquered it. But war, sickness, and disasters broke up his forces, and the treacherous Frenchmen met the due reward of their perfidy, and were, in 1804, totally driven from the island. The independence of St. Domingo was actually established in 1804. The independence of Hayti was recognized by the United States in 1862.

From this brief outline it is shown, that France recognizes the right, under martial law, to emancipate the slaves of an enemy — having asserted and exercised that right in the case of St. Domingo.* And the slaves thus liberated have retained their liberty, and compose, at this day, the principal population of a government who have entered into diplomatic relations with the United States.

In Colombia slavery was abolished, first by the Spanish General Morillo, and secondly by the American General Bolivar. "It was abolished," says John Quincy Adams, "by virtue of a military command given at the head of the army, and its abolition continues to this day. It was abolished by the laws of war, and not by the municipal enactments; the power was exercised

* For the decree of the French Assembly, see *Choix de Rapports — Opinions et Discours prononcés à la Tribune Nationale depuis* 1789. Paris, 1821, t. xiv. p. 425. See *Abolition d'Esclavage (Colonies Francaises), par Augustin Cochin.* Paris, 1861. Vol. i. pp. 14, 15, &c.

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by military commanders, under instructions, of course, from their respective governments."

AUTHORITY AND USAGE CONFIRM THE RIGHT.

It may happen that when belligerents on both sides hold slaves, neither will deem it expedient, through fear of retaliation, to liberate the slaves of his adversary; but considerations of policy do not affect questions of international rights; and forbearance to exercise a power does not prove its non-existence. While no authority among eminent ancient writers on the subject has been found to deny the right of emancipation, the fact that England, France, Spain, and the South American republics have actually freed the slaves of their enemies, conclusively shows that the law and practice of modern civilized nations sanction that right.

HOW FAR THE GOVERNMENT OF THE UNITED STATES UNDER FORMER ADMINISTRATIONS HAVE SANCTIONED THE BELLIGERENT RIGHT OF EMANCIPATING SLAVES OF LOYAL AND OF DISLOYAL CITIZENS.

The government of the United States, in 1814, recognized the right of their military officers, in time of war, to appropriate to public use the slaves of loyal citizens without compensation therefor; also, in 1836, the right to reward slaves who have performed public service, by giving freedom to them and to their families; also, in 1838, the principle that slaves of loyal citizens, captured in war, should be emancipated, and not returned to their masters; and that slaves escaping to the army of the United States should be treated as prisoners of war, and not as property of their masters. These propositions are supported by the cases of General Jackson, General Jessup, General Taylor, and General Gaines.

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"In December, 1814," says a distinguished writer and speaker, "General Jackson impressed a large number of slaves at and near New Orleans, and set them at work erecting defences, behind which his troops won such glory on the 8th of January, 1815. The masters remonstrated. Jackson disregarded their remonstrances, and kept the slaves at work until many of them were killed by the enemy's shot; yet his action was approved by Mr. Madison, the cabinet, and by the Congress, which has ever refused to pay the masters for their losses. In this case, the masters were professedly friends to the government; and yet our Presidents, and cabinets, and generals have not hesitated to emancipate their slaves, whenever in time of war it was supposed to be for the interest of the country to do so. This was done in the exercise of the war power to which Mr. Adams referred, and for which he had the most abundant authority."

"In 1836 General Jessup engaged several fugitive slaves to act as guides and spies, agreeing, if they would serve the government faithfully, to secure to them the freedom of themselves and families. They fulfilled their engagement in good faith. The general gave them their freedom, and sent them to the west. Mr. Van Buren's administration sanctioned the contract, and Mr. Tyler's administration approved the proceeding of the general in setting the slaves and their families free."

The writer above quoted says,—

"Louis, the slave of a man named Pacheco, betrayed Major Dade's battalion, in 1836, and when he had witnessed their massacre, he joined the enemy. Two years subsequently he was captured. Pacheco claimed him; General Jessup said if he had time, he would try him before a court martial and hang him, but would not deliver him to any man. He, however, sent him west, and the fugitive slave became a free men. General Jessup reported his action to the War Department, and Mr. Van Buren, then President, with his cabinet, approved it. Pacheco then appealed to Congress, asking that body to pay him for the loss of his slave. The House of Representatives voted against the bill, which was rejected. All concurred in the opinion that General Jessup did right in emancipating the slave, instead of returning him to his master.

"In 1838 General Taylor captured a number of negroes said to be fugitive slaves. Citizens of Florida, learning what had been done, immediately gathered around his camp, intending to secure the slaves

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who had escaped from them. General Taylor told them that he had no prisoners but 'prisoners of war.' The claimants then desired to look at them, in order to determine whether he was holding their slaves as prisoners. The veteran warrior replied that no man should examine his prisoners for such a purpose; and he ordered them to depart. This action, being reported to the War Department, was approved by the Executive. The slaves, however, were sent west, and set free.

"In 1838 many fugitive slaves and Indians, captured in Florida, had been ordered to be sent west of the Mississippi. Some of them were claimed at New Orleans by their owners, under legal process. General Gaines, commander of the military district, refused to deliver them up to the sheriff, and appeared in court and stated his own defence.

"His grounds of defence were, 'that these men, women, and children were captured in war, and held as prisoners of war; that as commander of that military department he held them subject only to the order of the national Executive; that he could recognize no other power in time of war, or by the laws of war, as authorized to take prisoners from his possession. He asserted that in time of war all slaves were belligerents as much as their masters. The slave men cultivate the earth, and supply provisions. The women cook the food and nurse the sick, and contribute to the maintenance of the war, often more than the same number of males. The slave children equally contribute whatever they are able to the support of the war. The military officer, he said, can enter into no judicial examination of the claim of one man to the bone and muscle of another, as property; nor could he, as a military officer, know what the laws of Florida were while engaged in maintaining the federal government by force of arms. In such case he could only be guided by the laws of war, and whatever may be the laws of any State, they must yield to the safety of the federal government. He sent the slaves west, and they became free.'"*

On the 26th of May, 1836, in a debate in the House of Representatives upon the joint resolution for *distributing rations* to the distressed fugitives from Indian hostilities

* This defence of General Gaines may be found in House Document No. 225 of the 2d session of the 25th Congress.

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in the states of Alabama and Georgia, JOHN QUINCY ADAMS expressed the following opinions: —

"Sir, in the authority given to Congress by the constitution of the United States to *declare war*, all the powers incidental to war are, by necessary implication, conferred upon the *government* of the United States. Now, the powers incidental to war are derived, not from their internal municipal source, *but from the laws and usages of nations.*

"There are, then, Mr. Chairman, in the *authority of Congress and of the Executive, two classes of powers, altogether different in their nature, and often incompatible with each other — the war power and the peace power.* The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. *The war power* is limited only by the laws and usages of nations. This power is tremendous; *it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.* This, sir, is the power which authorizes you to pass the resolution now before you, and, in my opinion, no other."

After an interruption, Mr. Adams went on to say, —

"There are, indeed, powers of peace conferred upon Congress which also come within the scope and jurisdiction of the laws of nations, such as the negotiation of treaties of amity and commerce, the interchange of public ministers and consuls, and all the personal and social intercourse between the individual inhabitants of the United States and foreign nations, and the Indian tribes, which require the interposition of any law. *But the powers of war are all* regulated by the laws of nations, and *are subject to no other limitation. . . .* It was upon this principle that I voted *against* the resolution reported by the slavery committee, 'that Congress possess no constitutional authority to interfere, *in any way*, with the institution of slavery in any of the States of this confederacy,' to which resolution most of those with whom I usually concur, and even my own colleagues in this house, gave their assent. *I do not admit that there is, even among the peace powers of Congress, no such authority; but in war, there are many ways by which Congress not only have the authority, but* ARE BOUND TO INTERFERE WITH THE INSTITUTION OF SLAVERY IN THE STATES. The *existing law prohibiting the importation of slaves* into the United States from foreign countries is itself an *interference with the insti-*

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tution of slavery in the States. It was so considered by the founders of the constitution of the United States, in which it was stipulated that Congress should not interfere, in that way, with the institution, prior to the year 1808.

"During the late war with Great Britain, the military and naval commanders of that nation issued proclamations inviting the slaves to repair to their standard, with promises of freedom and of settlement in some of the British colonial establishments. This surely was an interference with the institution of slavery in the States. By the treaty of peace, Great Britian stipulated to evacuate all the forts and places in the United States, without carrying away any slaves. If the government of the United States had no power to interfere, *in any way*, with the institution of slavery in the States, they would not have had the authority to require this stipulation. It is well known that this engagement was not fulfilled by the British naval and military commanders; that, on the contrary, they did carry away all the slaves whom they had induced to join them, and that the *British government inflexibly refused to restore any of them to their masters;* that a claim of indemnity was consequently instituted in behalf of the owners of the slaves, and was successfully maintained. All that series of transactions was an interference by Congress with the institution of slavery in the States in one way — in the way of protection and support. It was by the institution of slavery alone that the restitution of slaves, enticed by proclamations into the British service, could be claimed as *property.* But for the institution of slavery, the British commanders could neither have allured them to their standard, nor restored them otherwise than as liberated prisoners of war. But for the institution of slavery, there could have been no stipulation that they should not be carried away as property, nor any claim of indemnity for the violation of that engagement."

Mr. Adams goes on to state how the war power may be used: —

"But the war power of Congress over the institution of slavery in the States is yet far more extensive. Suppose the case of a servile war, complicated, as to some extent it is even now, with an Indian war; suppose Congress were called to raise armies, *to supply money from the whole Union to suppress a servile insurrection:* would they have no authority to interfere with the institution of slavery? The issue of a servile war may be disastrous; it may become necessary for the

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master of the slave to recognize his emancipation by a treaty of peace: can it for an instant be pretended that Congress, in such a contingency, would have no authority to interfere with the institution of slavery, *in any way*, in the States? Why, it would be equivalent to saying that Congress have no constitutional authority to make peace. I suppose a more portentous case, certainly within the bounds of possibility — I would to God I could say, not within the bounds of probability — "

"Do you imagine," he asks, "that your Congress will have no constitutional authority to interfere with the institution of slavery, in any way, in the States of this confederacy? Sir, they must and will interfere with it — perhaps to sustain it by war, perhaps to abolish it by treaties of peace; and they will not only possess the constitutional power so to interfere, but they will be bound in duty to do it, by the express provisions of the constitution itself. From the instant that your slaveholding States become the theatre of a war, *civil, servile, or foreign war*, from that instant the war powers of Congress extend to interference with the institution of slavery, in every way by which it can be interfered with, from a claim of indemnity for slaves taken or destroyed, to the cession of States burdened with slavery to a foreign power."

Extracts from the speech of John Quincy Adams, delivered in the United States House of Representatives, April 14th and 15th, 1842, on war with Great Britain and Mexico have been reported as follows:

"What I say is involuntary, because the subject has been brought into the house from another quarter, as the gentleman himself admits. I would leave that institution to the exclusive consideration and management of the States more peculiarly interested in it, just as long as they can keep within their own bounds. So far, I admit that Congress has no power to meddle with it. As long as they do not step out of their own bounds, and do not put the question to the people of the United States, whose peace, welfare, and happiness are all at stake, so long I will agree to leave them to themselves. But when a member from a free State brings forward certain resolutions, for which, instead of reasoning to disprove his positions, you vote a censure upon him, and that without hearing, it is quite another affair. At the time this was done, I said that, as far as I could understand the resolutions proposed by the gentleman from Ohio, (Mr. Giddings,) there were

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some of them for which I was ready to vote, and some which I must vote against; and I will now tell this house, my constituents, and the whole of mankind, that the resolution against which I would have voted was that in which he declares that what are called the slave States have the exclusive right of consultation on the subject of slavery. For that resolution I never would vote, because I believe that it is not just, and does not contain constitutional doctrine. I believe that, so long as the slave States are able to sustain their institutions without going abroad or calling upon other parts of the Union to aid them or act on the subject, so long I will consent never to interfere. I have said this, and I repeat it; but if they come to the free States, and say to them, You must help us to keep down our slaves, you must aid us in an insurrection and a civil war, then I say that with that call comes full and plenary power to this house and to the Senate over the whole subject. It is a war power. I say it is a war power; and when your country is actually in war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on, according to the laws of war; and by the laws of war, an invaded country has all its laws and municipal institutions swept by the board, and martial law takes the place of them. This power in Congress has, perhaps, never been called into exercise under the present constitution of the United States. But when the laws of war are in force, what, I ask, is one of those laws? It is this: that when a country is invaded, and two hostile armies are set in martial array, *the commanders of both armies have power to emancipate all the slaves in the invaded territory.* Nor is this a mere theoretic statement. The history of South America shows that the doctrine has been carried into practical execution within the last thirty years. Slavery was abolished in Colombia, first, by the Spanish General Morillo, and, secondly, by the American General Bolivar. It was abolished by virtue of a military command given at the head of the army, and its abolition continues to be law to this day. It was abolished by the laws of war, and not by the municipal enactments; the power was exercised by military commanders, under instructions, of course, from their respective governments. And here I recur again to the example of General Jackson. What are you now about in Congress? You are about passing a grant to refund to General Jackson the amount of a certain fine imposed upon him by a judge, under the laws of the State of Louisiana. You are going to refund him the money, with interest; and this you are going to do because the imposition of

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the fine was unjust. And why was it unjust? Because General Jackson was acting under the laws of war, and because the moment you place a military commander in a district which is the theatre of war, the laws of war apply to that district.

* * * * * * *

"I might furnish a thousand proofs to show that the pretensions of gentlemen to the sanctity of their municipal institutions under a state of actual invasion and of actual war, whether servile, civil, or foreign, is wholly unfounded, and that the laws of war do, in all such cases, take the precedence. I lay this down as the law of nations. I say that military authority takes, for the time, the place of all municipal institutions, *and slavery among the rest;* and that, under that state of things, so far from its being true that the States where slavery exists have the exclusive management of the subject, not only the President of the United States, but the commander of the army, has power to order the universal emancipation of the slaves. I have given here more in detail a principle which I have asserted on this floor before now, and of which I have no more doubt than that you, sir, occupy that chair. I give it in its development, in order that any gentleman from any part of the Union may, if he thinks proper, deny the truth of the position, and may maintain his denial; not by indignation, not by passion and fury, but by sound and sober reasoning from the laws of nations and the laws of war. And if my position can be answered and refuted, I shall receive the refutation with pleasure; I shall be glad to listen to reason, aside, as I say, from indignation and passion. And if, by the force of reasoning, my understanding can be convinced, I here pledge myself to recant what I have asserted.

"Let my position be answered; let me be told, let my constituents be told, let the people of my State be told, — a State whose soil tolerates not the foot of a slave, — that they are bound by the constitution to a long and toilsome march, under burning summer suns and a deadly southern clime, for the suppression of a servile war; that they are bound to leave their bodies to rot upon the sands of Carolina, to leave their wives widows and their children orphans; that those who cannot march are bound to pour out their treasures while their sons or brothers are pouring out their blood to suppress a servile, combined with a civil or a foreign war; and yet that there exists no power beyond the limits of the slave State where such war is raging to emancipate the slaves. I say, let this be proved — I am open to conviction; but till that conviction comes, I put it forth, not as a dictate of feeling, but as a settled maxim of the laws of nations, that, in such a case, the military super-

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sedes the civil power; and on this account I should have been obliged to vote, as I have said, against one of the resolutions of my excellent friend from Ohio, (Mr. Giddings,) or should at least have required that it be amended in conformity with the constitution of the United States."

CONCLUSION.

It has thus been proved, by the law and usage of modern civilized nations, by the judgment of eminent statesmen, and by the former practice of this government, that the President, as commander-in-chief, has the authority, as an act of war, to liberate the slaves of the enemy, and that the United States have in former times sanctioned the liberation of slaves even of loyal citizens, by military commanders, in time of war, without compensation therefor; and have deemed slaves captured in war from belligerent subjects as entitled to their freedom.*

* General War Powers of the President. It is not intended in this chapter to explain the *general* war powers of the President. They are principally contained in the Constitution, Art. II. Sect. 1, Cl. 1 and 7; Sect. 2, Cl. 1; Sect. 3, Cl. 1; and in Sect. 1, Cl. 1, and by necessary implication in Art. I. Sect. 9, Cl. 2. By Art. II. Sect. 2, the President is made commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the service of the United States. This clause gives ample powers of war to the President, when the army and navy are lawfully in "actual service." His military authority is supreme, under the constitution, while governing and regulating the land and naval forces, and treating captures on land and water in accordance with such rules as Congress may have passed in pursuance of Art. I. Sect. 8, Cl. 11, 14. Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements, and measures essential to overcome the enemy, — for the general conduct of the war, — the President is responsible to and controlled by no other department of government. His duty is to uphold the constitution and enforce the laws, and to respect whatever rights loyal citizens are entitled to enjoy in time of civil war, to the fullest extent that may be consistent with the performance of the military duty imposed on him. The effect of a state of war, in changing or modifying civil rights, has been explained in the preceding chapters.

What is the extent of the military power of the President over the persons and property of citizens at a distance from the seat of war — whether he or the war department may lawfully order the arrest of citizens in loyal states on reasonable proof that they are either enemies or aiding the enemy — or that they are spies or emissaries of rebels sent to gain information for their use, or

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to discourage enlistments — whether martial law may be extended over such places as the commander deems it necessary to guard, even though distant from any battle field, in order to enable him to prosecute the war effectually — whether the writ of *habeas corpus* may be suspended as to persons under military arrest, by the President, or only by Congress, (on which point judges of the United States courts disagree); whether, in time of war, all citizens are liable to military arrest, on reasonable proof of their aiding or abetting the enemy — or whether they are entitled to practise treason until indicted by some grand jury — thus, for example, whether Jefferson Davis, or General Lee, if found in Boston, could be arrested by military authority and sent to Fort Warren? Whether, in the midst of wide-spread and terrific war, those persons who violate the laws of war and the laws of peace, traitors, spies, emissaries, brigands, bush-rangers, guerrillas, persons in the free States supplying arms and ammunition to the enemy, must all be proceeded against by civil tribunals only, under due forms and precedents of law, by the tardy and ineffectual machinery of arrests by *marshals*, (who can rarely have means of apprehending them,) and of grand *juries*, (who meet twice a year, and could seldom if ever seasonably secure the evidence on which to indict them)? Whether government is not entitled by military power to PREVENT the traitors and spies, by arrest and imprisonment, from doing the intended mischief, as well as to punish them after it is done? Whether war can be carried on successfully, without the power to save the army and navy from being betrayed and destroyed, by *depriving* any citizen temporarily of the power of acting as an enemy, whenever there is reasonable cause to suspect him of being one? Whether these and similar proceedings are, or are not, in violation of any civil rights of citizens under the constitution, are questions to which the answers depend on the construction given to the war powers of the Executive. Whatever any commander-in-chief, in accordance with the usual practice of carrying on war among civilized nations, may order his army and navy to do, is within the *power* of the President to order and to execute, because the constitution, in express terms, gives him the supreme command of both. If he makes war upon a foreign nation, he should be governed by the law of nations; if lawfully engaged in civil war, he may treat his enemies as subjects and as belligerents.

The constitution provides that the government and regulation of the land and naval forces, and the treatment of captures, should be according to law; but it imposes, in express terms, no other qualification of the war power of the President. It does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted; nor to which the picket guard, or military guards (sometimes called *provost marshals*) shall be confined. It does not exempt any person making war upon the country, or aiding and comforting the enemy, from being *captured*, or arrested, wherever he may be found, whether within or out of the lines of any division of the army. It does not provide that public enemies, or their abettors, shall find safe asylum in any part of the United States where military power can reach them. It requires the President, as an executive magistrate, in time of peace to see that the laws existing in time of peace are faithfully executed — and as commander-in-chief, in time of war, to see that the laws of war are executed. In doing both duties he is strictly obeying the constitution.

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CHAPTER IV.

BILLS OF ATTAINDER.

After the authority of government shall have been reëstablished over the rebellious districts, measures may be taken to punish individual criminals.

The popular sense of outraged justice will embody itself in more or less stringent legislation against those who have brought civil war upon us. It would be surprising if extreme severity were not demanded by the supporters of the Union in all sections of the country. Nothing short of a general bill of attainder, it is presumed, will fully satisfy some of the loyal people of the slave States.

BILLS OF ATTAINDER IN ENGLAND.

By these statutes, famous in English political history, tyrannical governments have usually inflicted their severest revenge upon traitors. The irresistible power of law has been evoked to annihilate the criminal, as a citizen of that State whose majesty he had offended, and whose existence he had assailed. His life was terminated with horrid tortures; his blood was corrupted, and his estates were forfeited to the king. While still living, he was deemed, in the language of the law, as "*civiliter mortuus.*"

PUNISHMENT BY ATTAINDER.

The refined cruelty which characterized the punishment of treason, according to the common law of Eng-

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land, would have been discreditable to the barbarism of North American savages in the time of the Georges, and has since been equalled only by some specimens of chivalry in the secession army. The mode of executing these unfortunate political offenders was this: —

1. The culprit was required to be dragged on the ground or over the pavement to the gallows; he could not be allowed, by law, to walk or ride. Blackstone says, that *by connivance*, at last ripened into law, he was allowed to be dragged upon a hurdle, to prevent the extreme torment of being dragged on the ground or pavement.

2. To be hanged by the neck, and then cut down alive.

3. His entrails to be taken out and burned while he was yet alive.

4. His head to be cut off.

5. His body to be divided into four parts.

6. His head and quarters to be at the king's disposal.*

Blackstone informs us that these directions were, in former times, literally and studiously executed. Judge Story observes, they "indicate at once a savage and ferocious spirit, and a degrading subserviency to royal resentments, real or supposed." †

ATTAINDERS PROHIBITED AS INCONSISTENT WITH CONSTITUTIONAL LIBERTY.

Bills of attainder struck at the root of all civil rights and political liberty. To declare single individuals, or

* 4 Bla. Com. 92.

† Lord Coke undertakes to justify the severity of this punishment by examples drawn from Scripture.

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a large class of persons, criminals, in time of peace, merely upon the ground that they entertained certain opinions upon questions of church or state; to do this by act of Parliament, without a hearing, or after the death of the alleged offender; to involve the innocent with the guilty in indiscriminate punishment, — was an outrage upon the rights of the people not to be tolerated in our constitution as one of the powers of government.

BILLS OF ATTAINDER ABOLISHED.

The constitution provides expressly,* that no bill of attainder, or *ex post facto* law, shall be passed by Congress; and that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.† There is, therefore, no power in this country to pass any bill of attainder.

WHAT IS A BILL OF ATTAINDER?

Wherein does it differ from other statutes for the punishment of criminals?

A "bill of attainder," in the technical language of the law, is a statute by which the offender becomes "attainted," and is liable to punishment without having been convicted of any crime in the ordinary course of judicial proceedings.

If a person be expressly named in the bill, or comes within the terms thereof, he is liable to punishment. The legislature undertakes to pronounce upon the guilt of the accused party. He is entitled to no hearing, when living, and may be pronounced guilty when ab-

* Art. I. Sect. 9. † Art. I. Sect. 10.

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sent from the country, or even long after his death. Lord Coke says that the reigning monarch of England, who was slain at Bosworth, is said to have been attainted by act of Parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of a throne and a traitor.*

A question has been raised, whether any statute can be deemed a bill of attainder if it inflicts a degree of punishment less than that of death?

In technical law, statutes were called bills of attainder only when they inflicted the penalty of death or outlawry; while statutes which inflicted only forfeitures, fines, imprisonments, and similar punishments, were called bills of "pains and penalties." This distinction was practically observed in the legislation of England. No bill of attainder can probably be found which did not contain the marked feature of the death penalty, or the penalty of outlawry, which was considered as equivalent to a judgment of death. Judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, was founded on that which was in law deemed a tacit confession of guilt.†

BILLS OF PAINS AND PENALTIES.

It has been said that within the sense of the constitution, bills of attainder include bills of pains and penalties; and this view seemed to derive support from a remark of a judge of the Supreme Court. "A bill of attainder may affect the life of an individual, or may confiscate his property, or both." ‡

It is true that a bill of attainder may affect the life

* See Story on the Constitution, B. III. Sect. 678.

† Standf. Pl. Co. 44, 122, 182.

‡ *Fletcher* v. *Peck*, 6 Cranch, R.

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of an individual; but if the individual attainted were dead before the passage of the act, as was the case with Richard III., the bill could not affect his life; or if a bill of attainder upon outlawry were passed against persons beyond seas, the life of the party would not be in fact affected, although the outlawry was equivalent in the eye of the law to civil death. There is nothing in this dictum inconsistent with the ancient and acknowledged distinction between bills of attainder and bills of pains and penalties; nothing which would authorize the enlargement of the technical meaning of the words; nothing which shows that Judge Marshall deemed that bills of attainder included bills of pains and penalties within the sense of the constitution. This dictum is quoted by Judge Story,* who supposed its meaning went beyond that which is now attributed to it. But he does not appear to sanction such a view of the law. This is the only authority to which he refers; and he introduces the proposed construction of this clause by language which is used by lawyers who have little confidence in the result which the authority indicates, viz., "it seems." No case has been decided by the Supreme Court of the United States which shows that "bills of attainder," within the sense of the constitution, include any other statutes than those which were technically so considered according to the law of England.

EX POST FACTO LAWS PROHIBITED. BILLS OF PAINS AND PENALTIES, AS WELL AS ATTAINDERS, UNCONSTITUTIONAL.†

It does not seem important whether the one or the other construction be put upon the language of this

* Com. Const. III. Ch. 32, Sect. 3.

† See note to Forty-third Edition, *Ex parte Garland*, Appendix, 565. *Cummings* v. *State of Missouri*, Appendix, 556. See Index, title "Attainder."

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clause, nor whether bills of pains and penalties be or be not included within the prohibition; for Congress can pass no *ex post facto* law; and it was one of the invariable characteristics of bills of attainder, and of bills of pains and penalties, that they were passed for the punishment of supposed crimes which had been committed before the acts were passed.

The clause prohibiting Congress from passing any *ex post facto* law would doubtless have prevented their passing any bill of attainder; but this prohibition was inserted from greater caution, and to prevent the exercise of constructive powers against political offenders. No usurpation of authority in the worst days of English tyranny was more detested by the framers of our constitution than that which attempted to ride over the rights of Englishmen to gratify royal revenge against the friends of free government. Hence in that respect they shut down the gate upon this sovereign power of tyrants. They forbade any punishment, under any form, for crime not against some standing law, which had been enacted before the time of its commission. They prevented Congress from passing any attainder laws, whereby the accused might be deprived of his life, or his estate, or both, without trial by jury, and by his political enemies; and whereby also his relatives would suffer equally with himself.

ATTAINDERS IN THE COLONIES AND STATES.

Laws in the nature of bills of attainder were familiar to our ancestors in most of the colonies and in the States which subsequently formed the Union. And several of these acts of attainder have been pronounced valid by the highest courts in these States. By the

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act of the State of New York, October 22, 1779, the real and personal property of persons adhering to the enemy was forfeited to the State; and this act has been held valid,* and proceedings under acts of attainder were, as the court held, to be construed according to the rules in cases of attainder, and not by the ordinary course of judicial proceedings;† and these laws applied to persons who were dead at the time of the proceedings.‡

"Bills of attainder," says the learned judge, (in 2 Johnson's Cases,) "have always been construed in this respect with more latitude than ordinary judicial proceedings, for the purpose of giving them more certain effect, and that the intent of the legislature may prevail." "They are extraordinary acts of sovereignty, founded on public policy § and the peace of the community." "The attainted person," says Sir Matthew Hale, "is guilty of the execrable murder of the king." The act of New York, October 22, 1779, attainted, among others, Thomas Jones of the offence of adhering to the enemies of the State. This was a specific offence, and was not declared or understood to amount to treason, because many of the persons attainted had never owed allegiance to the State. ||

Bills of attainder were passed not only in New York, but in several other colonies and States, inflicting the penalties of attainder for other crimes than treason, actual or constructive. And the harsh operation of such laws, their injustice, and their liability to be abused

* *Sleight* v. *Kane*, 2 Johns. Cas. 236, decided in April, 1801.
† *Jackson* v. *Sands*, 2 Johns. 267.
‡ *Jackson* v. *Stokes*, 3 Johns. 15.
§ Foster, 83, 84.
|| *Jackson* v. *Catlin*, 2 Johns. R. 260.

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in times of public excitement, were understood by those who laid the foundations of this government too well to permit them to disregard the dangers which they sought to avert, by depriving Congress, as well as the several States, of all power to enact such cruel statutes.

If bills of attainder had been passed only for the punishment of treason, in the sense of making war upon the government, or aiding the enemy, they would have been less odious and less dangerous; but the regiment of crimes which servile Parliaments had enrolled under the title of "treason," had become so formidable, and the brutality of the civil contests in England had been so shocking, that it was thought unsafe to trust any government with the arbitrary and irresponsible power of condemning by statute large classes of their opponents to death and destruction for that which only want of success had made a crime.

BILLS OF ATTAINDER, HOW RECOGNIZED.

The consequences of attainder to the estate of the party convicted will be more fully stated hereafter; but it is essential to observe that there are certain characteristics which distinguish bills of attainder from all other penal statutes.

1. They always inflict the penalty of death upon the offender, or of outlawry, which is equivalent to death.

2. They are always *ex post facto* laws, being passed after the crime was committed which they are to punish.

3. They never allow the guilt or innocence of the persons attainted to be ascertained by trial; but the guilt is attributed to them by act of Parliament.

4. They always impose certain penalties, among

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which are corruption of blood and forfeiture of estate. The essence of attainder is in corruption of blood, and without the corruption of blood no person is by the English law attainted. Unless a law of Congress shall contain these characteristics, penalty of death, or outlawry, corruption of blood, and the legislative, not judicial condemnation of the offender, embodied in a law passed after the commission of the crime it seeks to punish, it is not a bill of attainder within the meaning of the constitution.*

* *Note to Forty-third Edition.* — See the opinion of dissenting judges in *Ex parte Garland*, p. 569; *Drehman* v. *Stifle*, 8 Wallace, 595; *Bigelow* v. *Forest*, App. 610; *Cummings* v. *State of Missouri*, App. 556; Index, "Attainder."

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INTRODUCTION TO CHAPTER V.

UNDER the English law, prior to the Revolution, there had been three modes of punishing the crime of Treason. First, by bills of attainder. Second, by judicial attainder. Third, by statutes of the realm against treason, actual and constructive. Bills of attainder were acts of Parliament, which declared one or more persons, whether living or dead, or absent beyond seas, guilty of the crime of actual or constructive treason. Judicial attainder was effected in the courts of law by process issued against persons accused of treason, whether living or dead, or absent beyond seas. The effect of attainder by judicial process was substantially the same as that of attainder by act of Parliament, in working corruption of blood, and likewise forfeiture of estates during the life of the offender, and after he was dead.

Persons accused of treason were punishable under statutes, by death and total forfeiture of estates; but no one could be convicted, sentenced, and punished for treason, under statutes, "except during his life," that is to say, while alive, nor unless he had received a trial in court, conducted according to the usual forms of procedure.

By our Constitution, all power is taken from the General Government, and from all the States, to punish treason by passing any bill of attainder, as is shown in Chapter IV.

Congress has power to authorize courts to punish treason by judicial attainder; but the Constitution has limited the time during which such process may be applied, and its effect, in these words:

"But no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

These provisions apply only to judicial attainder, and not to punishments of treason under ordinary statutes of Congress, which provide for no attainder.

The constitutional power of Congress to authorize proceedings for judicial attainder of persons who have committed treason, has not been, thus far, carried into effect.

No process of attainder of treason is now known in our municipal law.

To guard against abuse, under which our forefathers in England suffered, by reason of unjust and arbitrary definitions of treason, the Constitution prescribes certain rules for the definition, proof, and punishment of offences under statute law, which Congress may pass for the punishment of that crime. It

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defines treason to be "a levying of war against the United States," thus cutting off all the other descriptions of treason known to the English law. It requires, in proof of treason, that there shall be two witnesses to each overt act with which the accused is charged. A trial by jury in open court, and in the presence of witnesses, is secured, but when one is convicted he is liable to such punishment as may have been prescribed by the statute, and there is no limit in the Constitution to the penalty which Congress may provide.

Thus the traitor may be subjected to punishment by death, and to the forfeiture of all his estate, or to fine to an unlimited amount. The criminal, however, may not be, and by existing laws is not, attainted, or subject to any of the effects of attainder, by these proceedings. The limitations of the Constitution are inapplicable to statutes which do not provide for attainder, but only for penalties of death and confiscation.

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CHAPTER V.

RIGHT OF CONGRESS TO DECLARE BY STATUTE THE PUNISHMENT OF TREASON, AND ITS CONSTITUTIONAL LIMITATIONS.

TREASON.

THE highest crime known to the law is *treason.* It is "the sum of all villanies;" its agents have been branded with infamy in all countries where fidelity and justice have respect. The name of one who betrays his friend becomes a byword and a reproach. How much deeper are the guilt and infamy of the criminal who betrays his country! No convict in our State prisons can have fallen so low as willingly to associate with a TRAITOR. There is no abyss of crime so dark, so horrible, as that to which the traitor has descended. He has left forever behind him conscience, honor, and hope.

ANCIENT ENGLISH DOCTRINE OF CONSTRUCTIVE TREASON.

Treason, as defined in the law of England, at the date of the constitution, embraced many misdemeanors which are not now held to be crimes. Offences of a political character, not accompanied with any intention to subvert the government; mere words of disrespect to the ruling sovereign; assaults upon the king's officers at certain times and places; striking one of the judges in court; and many other acts which did not partake of the nature of treason, were, in ancient times, declared treason by Parliament, or so construed by judges, as to constitute that crime. Indeed, there was nothing to

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prevent Parliament from proclaiming any act of a subject to be treason, thereby subjecting him to all its terrible penalties. The doctrine of *constructive treasons*, created by servile judges, who held their office during the pleasure of the king, was used by them in such a way as to enable the sovereign safely to wreak vengeance upon his victims under the guise of judicial condemnation. If the king sought to destroy a rival, the judges would pronounce him guilty of constructive treason; in other words, they would so construe the acts of the defendant as to make them treason. Thus the king could selfishly outrage every principle of law and justice, while avoiding responsibility. No man's life or property was safe. The wealthier the citizen, the greater was his apprehension that the king would seize and confiscate his estates. The danger lay in the fact that the nature and extent of the legal crime of treason was indeterminate, or was left to arbitrary determination. The power to *define* treason, to declare from time to time who should be deemed in law to be traitors, was in its nature an *arbitrary* power. No government having that power would fail to become oppressive in times of excitement, and especially in civil war. As early as the reign of Edward III., Parliament put an end to these judge-made-treasons by declaring and defining all the different acts which should be deemed treason; and, although subsequent statutes have added to or modified the law, yet treason has at all times since that reign been defined by statute.

POWER OF CONGRESS TO DEFINE AND PUNISH TREASON LIMITED.

It was with full knowledge of the history of judicial usurpation, of the tyranny of exasperated govern-

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ments, and of the tendency of rival factions in republics to seek revenge on each other, that the convention which framed the constitution, having given no power to the judiciary, like that possessed by English judges, to make constructive crimes, introduced several provisions limiting the power of Congress to define and punish the political crime of treason, as well as other offences. The various clauses in the constitution relating to this subject, in order to a clear exposition of their meaning, should be taken together as parts of one system.

ATTAINDER AND EX POST FACTO LAWS.

The first and most important limitation of the power of Congress is found in Art. I., Sect. 9: "No bill of attainder or *ex post facto* law shall be passed." By prohibiting bills of attainder, no subject could be made a criminal, or be deprived of life, liberty, or property, by mere *act of legislation*, without trial or conviction. The power to enact *ex post facto* laws having been withheld, Congress could not pass "a statute which would render an act punishable in a manner in which it was not punishable when it was committed." No man's life could be taken, nor could his liberty be abridged, nor his estate, nor any part of it, be seized, unless for an act which, previously to the commission thereof, had been declared by law to be a crime, nor unless the manner and extent of punishment therefor had been prescribed.* Hence no law of Congress can make that deed a crime which was not so before the deed was done. Every man may know what are the

* See *Fletcher* v. *Peck*, 6 Cranch, 138.

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laws to which he is amenable in time of peace by reading the statutes. There can be no retrospective criminal legislation by any State, or by the United States.

TREASON DEFINED BY STATUTE.

These points having been secured, the next step was to *define* the CRIME OF TREASON. Countless difficulties and dangers were avoided by selecting from the English statutes *one crime only*, which should be deemed to constitute that offence.

The constitution provides that, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." * Hence many acts are not treasonable which were so considered according to the law of England, and of the colonies and States of this country. Each State still retains the power to define and punish treason against itself in its own way.

Nothing but *overt acts* are treasonable by the laws of the United States; and these overt acts must be overt acts of war.† These acts must be proved either by confession in open court, or by two witnesses to the same act. ‡ Our ancestors took care that no one should be convicted of this infamous crime, unless his guilt is made certain. So odious was the offence that even a senator or representative could be arrested on *suspicion* of it. § All civil officers were to be removed from office on impeachment and conviction thereof. || And a person charged with treason against a State, and fleeing from that State to another, was to be delivered

* Art. III. Sect. 3. † Ibid. ‡ Ibid.
§ Art. I. Sect. 6. || Art. II. Sect. 4.

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up, on demand, to the State having jurisdiction.* The crime being defined, and the nature of the testimony to establish it being prescribed, and conviction being possible only in "open court," the constitution then provides, that "Congress shall have power to declare the *punishment* of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." †

THE POWER OF THE LEGISLATURE TO DECLARE THE PUNISHMENT OF TREASON IS UNLIMITED.

By Art. III., Sect. 3, above cited, the constitution has in express terms given to Congress the power to declare the punishment of treason. As the manner and extent of that punishment are not prescribed, it may impose the penalties of fine, or imprisonment, or outlawry, or banishment, or forfeiture, or death, or of death and forfeiture of property, personal and real; and it might add to all these inflictions the more terrible sufferings which follow, *as a consequence of attainder of treason*, under the law of England, had the constitution not limited the effect and operation of that species of attainder.

MISINTERPRETATION OF ART. III., SECT. 3.

Some writer, have supposed that this article in the constitution, which qualifies the *effect* of an attainder of treason, was *a limitation* of the power of Congress to declare the *punishment* of treason. This is an error. A careful examination of the language used in the in-

* Constitution, Art. IV., Sect. 2.
† Art. III., Sect. 3.

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strument itself, and of the history of the English law of attainder, will make it evident that the framers of the constitution, in drafting Sect. 3 of Art. III. did not design to restrain Congress from declaring against the traitor himself, his person or estate, such penalties as it might deem sufficient to atone for the highest of crimes.

Whenever a person had committed high treason in England, and had been duly indicted, tried, and convicted, and when final judgment of guilty, and sentence of death or outlawry, had been pronounced upon him, the immediate and inseparable consequence, by common law, of the sentence of death or outlawry of the offender for treason, and for certain other felonies, was *attainder*. Attainder means, in its original application, the staining or corruption of the blood of a criminal who was in the contemplation of law dead. He then became "*attinctus* — stained, blackened, attainted."

CONSEQUENCES OF ATTAINDER.

Certain legal results followed *attainder*, among which are the following: The convict was no longer of any credit or reputation. He could not be a witness in any court. He was not capable of performing the legal functions of any other man; his power to sell or transfer his lands and personal estate ceased. By anticipation of his punishment he was already dead in law,* except when the fiction of the law would protect him from some liability to others which he had the power to discharge. It is true that the attainted felon could not be murdered with impunity,† but the law preserved

* 3 Inst. 213.

† Foster, 73.

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his physical existence only to vindicate its own majesty, and to inflict upon the offender an ignominious death.

CORRUPTION OF BLOOD.

Among the most important consequences of *attainder* of *felony*, were those *resulting from "corruption of blood,"* which is the *essence of attainder.** Blackstone says,† —

"Another immediate consequence of attainder is the corruption of blood, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture; and the person attainted shall also obstruct all descents to his posterity whenever they are obliged to derive a title through him, to a remote ancestor."

The distinctions between escheat and forfeiture it is not necessary now to state,‡ because, whether the forfeiture enured to the benefit of the lord or of the king, the effect was the same upon the estate of the criminal.§ By this legal fiction of *corruption of blood*, the offender was deprived of all his estate, personal and real; his children or other heirs could not inherit any thing from him, nor through him from any of his ancestors. "If a father be seized in fee, and the son commits treason and is attainted, and then the father dies, then the lands shall escheat to the lord."||

SAVAGE CRUELTY OF ENGLISH LAW.

By the English system of escheats to the lord and forfeitures to the king, the innocent relatives of the offender were punished, upon the theory that it was

* See Co. Litt. 391. † 4 Com. b. 388. ‡ See Co. Litt. 13.
§ Co. Litt. 391. Bla. Com. Vol. II. p. 254. || Co. Litt. 13.

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the duty of every family to secure the loyalty of all its members to the sovereign; and upon failure to do so, the whole family should be plunged into lasting disgrace and poverty. A punishment which might continue for twenty generations, was indeed inhuman, and received, as it merited, the condemnation of liberal men in all countries; * but aristocratic influence in England had for centuries resisted the absolute and final abandonment of these odious penalties. The framers of the constitution have deprived Congress of the power of passing bills of attainder. They might have provided that no person convicted of treason should be held to be attainted, or be liable to suffer any of the common law penalties which resulted from attainder, but only such penalties as Congress should prescribe by statute. They have, however, not in terms, abolished attainders, but have modified their effect, by declaring that attainder shall not work corruption of blood.

FORFEITURES.

By the law of England, forfeiture of estates was also one of the necessary legal consequences of attainder of felony. Real estate was forfeited upon attainder, personal estate upon conviction before attainder. By these forfeitures all the property, rights, and claims, of every name and nature, went to the lord or the king. But forfeiture of lands related back to the time when the felony was committed, so as to avoid all subsequent sales and encumbrances, but forfeiture of goods took effect at the date of conviction, so that sales of personal property, prior to that time, were valid, unless col-

* See 4 Bla. Com. 388.

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lusive.* The estates thus forfeited were not mere estates for life, but the whole interest of the felon, whatever it might be. Thus forfeiture of property was a consequence of attainder; attainder was a consequence of the sentence of death or outlawry; and these penal consequences of attainder were over and above, and in addition to, the penalties expressed in the terms of *the judgment* and *sentence of the court.*† The punishment, and in many instances the only punishment, to which the sentence of the court condemned the prisoner, was death or outlawry. The disabilities which resulted from that sentence were like the disabilities which in other cases result from the sentence of a criminal for infamous crimes. Disability to testify in courts, or to hold offices of trust and honor, sometimes follows, not as part of the punishment prescribed for the offence, but as a consequence of the condition to which the criminal has reduced himself.

There is a clear distinction between the punishment of treason by specific penalties and those consequential damages and injuries which follow by common law as the result or technical effect of a sentence of death or outlawry for treason, viz., attainder of treason, and corruption of blood and forfeiture of estates.‡ To set this subject in a clearer light, the learned reader will recollect that there were different kinds of attainder:

* See Stat. 13 Eliz. chap. 5; 2 B. & A. 258; 2 Hawkins's P. C. 454; 3 Ins. 232; 4 Bla. 387; Co. Litt. 391, b.

† See 2 Greenleaf's Cruise on Real Property, p. 145, and note; 2 Kent, 386; 1 Greenleaf's Cruise, p. 71, sect. 1, and note.

‡ There is a provision in the new constitution of Maryland (1851), that "no conviction shall work corruption of blood or forfeiture of estate." (Decl. of Rights, Art. 24.) The constitution of Ohio (1851) contains the same words in the 12th section of the Declaration of Rights. The constitutions of Kentucky, Delaware, and Pennsylvania declare that

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1. *Attainders in a præmunire;* in which, "from the conviction, the defendant shall be out of the king's protection, his lands, tenements, goods, and chattels forfeited to the king, and his body remain in prison during the king's pleasure, or during life." * But the offences punishable under the statutes of præmunire were not felonies, for the latter are punishable only by common law, and not by statute.† 2. *Attainder by bill.* 3. *Attainders of* FELONY and treason; and the important distinction between attainders in treason and attainders in præmunire is this: that in the former the forfeitures are consequences of the judgment, in the latter they are part of the judgment and penalty. Blackstone ‡ recognizes fully this distinction. "I here omit the particular forfeitures created by the statutes of præmunire and others, because I look upon them rather as a part of the judgment and penalty inflicted by the respective statutes, than as consequences of such judgment, as in treason and felony they are." Lord Coke expresses the same opinion.§ And statutes of præmunire and attainders of treason are both different in law from *bills of pains and penalties;* of which English history affords, among many other examples, that against the Bishop

attainder of treason shall not work forfeiture beyond the lifetime of the offender. In Alabama, Connecticut, Indiana, Illinois, Maine, Missouri, New Jersey, Rhode Island, and Tennessee, all forfeitures for crime are abolished, either by statutes or constitutions.

"In New Hampshire, Massachusetts, Virginia, Georgia, Michigan, Mississippi, and Arkansas, there are statutes providing specifically for the punishment of treason and felonies; but no mention is made of corruption of blood or forfeiture of estate; and inasmuch as these offences are explicitly legislated upon, and a particular punishment provided in each case, it may be gravely doubted whether the additional common law punishment of forfeiture of estate ought not to be considered as repealed by implication." 1 Greenleaf's Cruise Dig. 196, note.

* 1 Inst. 129; 3 Bla. p. 118; and for the severity of the penalties, see 1 Hawk. P. C. 55.

† 4 Bla. 118.

‡ 4 Com. p. 386.

§ Co. Litt. 391, b.

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of Rochester;† in the latter the pains and penalties are all expressly declared by statute, and not left as consequences of judgment. That clause in the constitution which gives power to Congress to make laws for the punishment of treason, limits and qualifies the effect of attainder of treason, in case such attainder should be deemed by the courts as a legal consequence of such sentence as the statute requires the court to impose on traitors. This limitation applies, in terms, *only* to the effect of attainders of treason.

CHARACTERISTICS OF ATTAINDER OF TREASON.

There is no attainder of treason known to the law of England, unless, 1. The judgment of death or outlawry has been pronounced against the traitor.‡ 2. Where the crime was a *felony*, and punishable according to common law§; and, 3. Where the attainder was a consequence of the judgment, and not part of the judgment and penalty.|| Congress may pass a law condemning every traitor to death, and to the consequential punishment of "attainder;" but such attainder will not of itself operate to corrupt blood or forfeit estate except during the life of the offender. But unless Congress pass a law expressly *attainting* the criminal of treason, there is not, under the laws of the United States, any "attainder." The criminal laws of the United States are all embraced in specific statutes, defining crimes and all their penalties. No consequential

* Stat. 9 Geo. I. chap. 17. † 4 Bla. 387.
‡ 4 Bla. 387.
§ Ib.; Co. Litt. 391, b.; 4 Bla. 386.

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penalties of this character are known to this law. And if a person is convicted and sentenced to death for treason, there can be no corruption of blood, nor forfeiture of estate except by express terms of the statute. The leading principles of the constitution forbid the making of laws which should leave the penalty of crime to be determined by ancient or antiquated common law proceedings of English courts. Forfeiture of estate, by express terms of statute, may be in the nature of forfeiture by a bill of pains and penalties, or præmunire, but is not forfeiture by attainder; nor is it such forfeiture as is within the sense of the constitution, which limits the operation of attainders of treason. This distinction was well known to the framers of the constitution. They thought it best to guard against the danger of those constructive and consequential punishments, giving full power to Congress, in plain terms, to prescribe by statute what punishment they should select; but in case of resort to attainder of treason, as one of those punishments, that form of punishment should not be so construed as, *ex vi termini*, to corrupt blood nor forfeit estate except during the life of the person attainted.

TECHNICAL LANGUAGE TO BE CONSTRUED TECHNICALLY.

The language of the constitution is peculiar; it is technical; and it shows on the face of it an intention to limit the technical operation of attainders, not to limit the scope or extent of legislative penalties. If the authors of the constitution meant to say that Congress should pass no law punishing treason by attainder, or by its consequences, viz., forfeiture of estate, or cor-

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ruption of blood, they would, in plain terms, have said so; and there would have been an end to the penalties of attainder, as there was an end to bills of attainder. Instead of saying, "Congress shall have power to declare the punishment of treason, but shall not impose the penalties of attainder upon the offender," they said, "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

This phraseology has reference only to the technical effect of attainder. The "working of forfeitures" is a phrase used by lawyers to show the legal result or effect which arises from a certain state of facts. If a traitor is convicted, judgment of death is passed upon him; by that judgment he becomes attainted. Attainder works forfeitures and corruption of blood; forfeitures and corruption of blood are, in the ordinary course of common law, followed by certain results to his rights of property. But the constitution provides, if the traitor is attainted, that attainder shall not, *ex vi termini*, and of its own force, and without statute to that effect, "work" forfeiture or corruption of blood. The convict may still retain all those civil rights of which he has not been deprived by the strict terms of the statute which shall declare the punishment of treason. That punishment, as provided by the statute of the United States of April 30, 1790, is death, and nothing more. Can any case be found, since this statute was enacted, in which a party convicted and adjudged guilty of treason and sentenced to death, has been held to be "attainted" of treason, so that the attainder has worked

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forfeiture of any of his estate, real or personal. Would it not astonish every lawyer if a court of the United States, having sentenced a traitor to death under the law of 1790, should announce as a further penalty, the forfeiture of the real and personal estate of the offender, "worked" by the attainder of felony, notwithstanding no such penalty is mentioned in that statute? If Congress should pass an act punishing a traitor by a fine of five dollars, and imprisonment for five years, who would not feel amazed to learn that in accordance to the English doctrine of forfeitures worked by attainders, the criminal would, by operation of law, be stripped of property worth thousands of dollars, in addition to the penalty prescribed in the statute under which he had been convicted?

TRUE MEANING OF ART. III. SECT. III. CL. II.

The constitution means that if traitors shall be attainted, unlimited forfeitures and corruption of blood shall not be worked by attainders. It means to leave untrammelled the power of Congress to cause traitors to be or not to be attainted; but if attainted, Congress must provide by statute for the attainder; and the constitution settles how far that attainder shall operate consequentially; and when the legislature has awarded one punishment for treason, the court shall not evoke the doctrine of forfeitures worked by attainder, and thus, by technical implication, add punishments not specifically set down in the penal statute itself; or if this implication exist, the results of the technical effect of attainder shall not be corruption of blood, or forfeiture, except during the life of the offender. The third ar-

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ticle does not limit the power of Congress to punish, but it limits the technical consequences of a special kind of punishment, which may or may not be adopted in the statutes.

From the foregoing remarks it is obvious that no person is attainted of treason, in the technical sense, who is convicted under the United States act of 1790. There can be no attainder of treason, within the meaning of the constitution, unless there be, first, a judgment of death, or outlawry; second, a penalty of attainder by express terms of the statute. A mere conviction of treason and sentence of death, or outlawry, and forfeitures of real and personal estate, do not constitute an attainder in form, in substance, nor in effect, when made under any of the present statutes of the United States.

IF CONGRESS MAY IMPOSE FINES, WHY NOT FORFEITURES?

No one doubts the power of Congress to make treason punishable with death, or by fines to any amount whatever. Nor would any reasonable person deem any fine too large to atone for the crime of involving one's own country in civil war. If the constitution placed in Congress the power to take life, and to take property of the offender in one form, why should it deny the power to take property in any other form? If the framers of the constitution were willing that a traitor should forfeit his life, how could they have intended to shelter his property? Was property, in their opinion, more sacred than life? Would all the property of rebels forfeited to the treasury of the country repair the injury of civil war?

* See Jefferson's Notes, pp. 162, 163.

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FORFEITURES NOT LIMITED TO LIFE ESTATES.

Could the jurists who drafted the constitution have intended to limit the pecuniary punishment of forfeiture to a life interest in personal estate, when every lawyer in the convention must have known that at common law there was no such thing as a life estate in personal property? Knowing this, did they mean to protect traitors, under all circumstances, in the enjoyment of personal property? If so, why did they not say so? If they meant to prevent Congress from passing any law that should deprive traitors of more than a life estate in real estate, the result would be, that the criminal would lose only the enjoyment of his lands for a few days or weeks, from the date of the judgment to the date of his execution, and then his lands would go to his heirs. Thus it is evident, that if the constitution cuts off the power of Congress to punish treason, and limits it to such forfeitures as are the consequence of attainder, and then cuts off from attainder its penal consequences of corruption of blood and forfeiture of property, excepting only the life estate of the offender, the framers of that instrument have effectually protected the personal and real estate of traitors, and have taken more care to secure them from the consequences of their crime than any other class of criminals. If so, they have authorized far more severity against many other felons than against them. If such were the purpose of the authors of the constitution, they would have taken direct and plain language to say what they meant. They would have said, "Congress may punish treason, but shall not deprive traitors of real or personal property, except for the time which may elapse between sentence of death and execution." Instead

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of this, they gave full power to provide for the punishment of treason by fines, forfeitures, death, and attainder, only limiting the technical effect of the last-mentioned penalty, if it should be adopted. Thus Congress has power, under the constitution, to declare, as the penalty for treason, a forfeiture of the entire estate of the offender, in his real and personal property, and is not limited, as has been supposed by some, to a forfeiture of real estate for life only.

NOTE. — Since the publication of the seventh edition, it has been decided by Underwood, J., in the Eastern District Court of the United States for Virginia, in the case of *United States* v. *Latham*, *first*, that the Confiscation Act above cited is authorized by the Constitution; *second*, that by the terms of that act (dated July 17, 1862, chap. 195), as modified by the joint resolution of July 27, 1862 (No. 63), the punishment of treason is not limited to forfeiture of the life estate of the offender, and is not required to be so limited by the Constitution; but the forfeiture extends to the entire estate in fee simple.

Note to Forty-third Edition. — Judge Underwood's construction of this statute has not been sustained by the Supreme Court; but its constitutionality is now conceded. Since this edition was in press, that court has decided in *Bigelow* v. *Forrest* (9 Wallace, 339), that the Confiscation Act of July 17, 1862, in connection with the explanatory resolution of the same date, is to be so construed that upon a decree of condemnation, all that could be sold was a life estate of the criminal. Appendix, p. 610. This decision, however, has no bearing upon the question of the constitutional right of Congress discussed in this chapter. See Note, p. 409; also Index, "Lincoln, President."

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CHAPTER VI.

STATUTES AGAINST TREASON. WHAT THEY ARE, AND HOW THEY ARE TO BE ADMINISTERED.

THE United States statute of April 30th, 1790, provides that, —

"If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort, within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged *guilty* of *treason* against the United States, and *shall suffer death.*"

Concealment of knowledge of treason (misprision of treason) is, by the same act, punished by fine not exceeding one thousand dollars, and imprisonment not exceeding seven years. By the statute of January 30th, 1799, corresponding with foreign governments, or with any officer or agent thereof, with intent to influence their controversies with the United States, or to defeat the measures of this government, is declared to be a high misdemeanor, though not called treason, and is punishable by fine not exceeding five thousand dollars, and imprisonment during a term not less than six months, nor exceeding three years. So the law has stood during this century, until the breaking out of the present rebellion.

The chief provisions of the law passed at the last session of Congress, and approved July, 17th, 1862, chap. 195. are these: —

Section 1. Persons committing treason shall suffer one of two punishments: 1. Either death, and freedom

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to his slaves; or, 2. Imprisonment not less than five years, fine not less than ten thousand dollars, and freedom of slaves; the fine to be collected out of any personal or real estate except slaves.

Sect. 2. Inciting rebellion, or engaging in it, or aiding those who do so, is punishable by imprisonment not more than ten years, fine not more than ten thousand dollars, and liberation of slaves.

Sect. 3 disqualifies convicts, under the preceding sections, from holding office under the United States.

Sect. 4 provides that former laws against treason shall not be suspended as against any traitor, unless he shall have been convicted under this act.

Sect. 5 makes it the duty of the President to cause the seizure of all the property, real and personal, of several classes of persons, and to apply the same to the support of the army, namely: 1. Rebel army and navy officers; 2. Government officers of Confederate States in their national capacity; 3. Confederate State officers; 4. United States officers turned traitor officers; 5. Any one holding any office or agency, national, state, or municipal, under the rebel government, *provided* persons enumerated in classes 3, 4, and 5 have accepted office since secession of the State, or have taken oath of allegiance to support the Confederate States; 6. Persons who, owning property in loyal States, in the territories, or in the District of Columbia, shall hereafter assist, aid, or comfort such rebellion. All transfers of property so owned shall be null, and suits for it by such persons shall be barred by proving that they are within the terms of this act.

Sect. 6. Any persons within the United States, not above named, who are engaged in armed rebellion, or

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aiding and abetting it, who shall not, within sixty days after proclamation by the President, "cease to aid, countenance, and abet said rebellion," shall be liable to have all their property, personal and real, seized by the President, whose duty it shall be to seize and use it, or the proceeds thereof. All transfers of such property, made more than sixty days after the proclamation, are declared null.

Sect. 7. To secure the condemnation and sale of seized property, so as to make it available, proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, or in any territorial court, or in the United States District Court for the District of Columbia, within which district or territory the property, or any part of it, may be found, or into which, if movable, it may first be brought. Proceedings are to conform to those in admiralty or revenue cases. Condemnation shall be as of enemy's property, and it shall belong to the United States; the proceeds thereof to be paid into the treasury.

Sect. 8. Proper powers are given to the courts to carry the above proceedings into effect, and to establish legal forms and processes and modes of transferring condemned property.

Sect. 9. Slaves of rebels, or of those aiding them, escaping and taking refuge within the lines of our army; slaves captured from them; slaves deserted by them, and coming under the control of the United States government; slaves found in places occupied by rebel forces, and afterwards occupied by the United States army, shall be deemed captives of war, and shall be forever *free*.

Sect. 10. No fugitive slave shall be returned to a person claiming him, nor restrained of his liberty, except for crime, or offence against law, unless the claimant

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swears that the person claiming the slave is his lawful owner, has not joined the rebellion, nor given aid to it. No officer or soldier of the United States shall surrender fugitive slaves.

Sect. 11. The President may employ, organize, and use as many persons of African descent as he pleases to suppress the rebellion, and use them as he judges for the public welfare.

Sect. 12. The President may make provisions for colonizing such persons as may choose to emigrate, after they shall have been freed by this act.

Sect. 13. The President is authorized by proclamation to pardon any persons engaged in the rebellion, on such terms as he deems expedient.

Sect. 14. Courts of the United States have full powers to institute proceedings, make orders, &c., to carry the foregoing measures into effect.

The joint explanatory resolution of the 17th of July, 1862, declares that this statute applies to no act done prior to its passage, and to no judge or member of a State legislature, who has not taken the oath of allegiance to support the constitution of the Confederate States; and that no punishment or proceedings shall be so construed as to "work forfeiture of the real estate of the offender beyond his natural life."

The President's proclamation, in accordance with the above act, was issued July 25th, 1862. Thus all persons engaged in the rebellion, who come within the provisions of the sixth section, will be liable to the penalties after sixty days from July 25th. This is one of the most important penal acts ever passed by the Congress of the United States.*

* *Note to Forty-third Edition.* — For the laws of the Confederate Congress which provide for confiscation of estates *in fee*, see Note on "Confiscation," p. 409.

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THE CONFISCATION ACT OF 1862 IS NOT A BILL OF ATTAINDER, NOR AN EX POST FACTO LAW.

This act is not a *bill of attainder*, because it does not punish the offender in any instance with corruption of blood, and it does not declare him, *by act of legislature*, guilty of treason, inasmuch as the offender's guilt must be duly proved and established by judicial proceedings before he can be sentenced. It is not an *ex post facto* law, as it declares no act committed prior to the time when the law goes into operation to be a crime, or to be punishable as such. It provides for no *attainder* of treason, and therefore for none of the penal consequences which might otherwise have followed from such attainder.*

The resolution, which is to be taken as part of the act, or as explanatory of it, expressly provides that no punishment or proceedings under said act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. Thus, to prevent our courts from construing the sentence of death, under Sect. 1, as involving an attainder of treason, and its consequences, Congress has, in express terms, provided that no punishment or proceeding shall be so construed as to work forfeiture, as above stated. Thus this statute limits the constructive penalties which result from forfeitures worked by attainders, and perhaps may be so construed as to confine the punishments to those, and those only, which are prescribed in the plain terms of the statute. And this limitation is in accordance with the constitution, as understood by the President, although the forfeiture of rebels' real estate might have been made absolute and unlimited, without exceeding the constitutional power of Congress to punish treason.†

* So decided by the Supreme Court in 1870, in *Bigelow* v. *Forrest*. Appendix, p. 610.

† *Note to Forty-third Edition.* — The views of President Lincoln on this question were subsequently changed. See Note on "Confiscation," pp. 406–409. Also, note to p. 111.

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CHAPTER VII.

THE RIGHT OF CONGRESS TO DECLARE THE PUNISHMENT OF CRIMES AGAINST THE UNITED STATES OTHER THAN TREASON.*

THE NEW CRIMES OF REBELLION REQUIRE NEW PENAL LAWS.

SEVERAL crimes may be committed not defined as treason in the constitution, but not less dangerous to the public welfare. The prevention or punishment of such offences is essential to the safety of every form of government; and the power of Congress to impose penalties in such cases cannot be reasonably questioned. The rights guaranteed in express terms to private citizens cannot be maintained, nor be made secure, without such penal legislation; and, accordingly, Congress has, from time to time, passed laws for this purpose. The present rebellion has given birth to a host of crimes which were not previously punishable by any law. Among these crimes are the following: Accepting or holding civil offices under the Confederate government; violating the oath of allegiance to the United States; taking an oath of allegiance to the Confederate States; manufacturing, passing, or circulating a new and illegal currency; acknowledging and obeying the authority of a seceded State, or of the Confederate States; neglecting or refusing to return to allegiance and to lay down arms after due warning; attempting to negotiate treaties with foreign powers to intervene in our affairs;

* *Note to Forty-third Edition.* — Most of the crimes enumerated in this chapter have become, since this essay was published, the subject of penal statutes.

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granting or taking letters of marque; conspiracy against the lawful government; holding public meetings to incite the people to the commission of treason; plotting treason; framing and passing ordinances of secession; organizing and forming new governments within any of the States, with the intent that they shall become independent of the United States, and hostile thereto; the making of treaties between the several States; refusal to take the oath of allegiance to the United States, when tendered by proper authority; resistance to civil process, or to civil officers of the United States, when such resistance is not so general as to constitute war. Each of these and many other public wrongs may be so committed as to avoid the penalty of treason, because they may not be overt acts of levying war, or of aiding and comforting the enemy, which the offender must have committed before he can have rendered himself liable to be punished for treason as defined in the constitution. These and other similar offences are perpetrated for the purpose of overthrowing government. Civil war must inevitably result from them. They might be deemed less heinous than open rebellion, if it were not certain that they are the fountain from which the streams of treason and civil war must flow, sweeping the innocent and the guilty with resistless tide onward to inevitable destruction.

ALL ATTEMPTS TO OVERTURN GOVERNMENT SHOULD BE PUNISHED.

Of the many atrocious misdeeds which are preliminary to or contemporaneous with treason, each and all may be and should be punishable by law. It is by no means desirable that the punishment of all of them should be by *death*, but rather by that penalty, which,

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depriving the criminal of the means of doing harm, will disgrace him in the community he has dishonored. Imprisonment, fines, forfeitures, confiscation, are the proper punishments for such hardened criminals, because imprisonment is a personal punishment, and fines, forfeitures, &c., merely transfer the property of the offender to the public, as a partial indemnity for the wrong he has committed.

When the terrible consequences of the crimes which foment civil war are considered, no penalty would seem too severe to expiate them. But it has been erroneously suggested that, as the levying of war — treason — itself is not punishable by depriving traitors of more than a life estate in their real estate, even though they are condemned to death, it could not have been the intention of the framers of the constitution to punish any of the crimes which may originate a civil war, by penalty equally severe with that to which they limited Congress, in punishing treason itself. A lower offence, it is said, should not be punished with more severity than a higher one. This objection would be more plausible if the power to punish treason were in fact limited. But, as has been shown in a previous chapter. such is not the fact.*

ACT OF 1862, SECTION VI., DOES NOT PURPORT TO PUNISH TREASON.

If the penalty of death be not inflicted on the guilty, and if he be not accused of treason, no question as to the validity of the statute could arise under this clause of the constitution limiting the effect of attainders of treason. No objection could be urged against its

* See Chap. V. p. 93.

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validity on the ground of its forfeiting or confiscating all the property of the offender, or of its depriving him of liberty by imprisonment, or of its exiling him from the country.

Section 6 of the act of 1862 does not impose the penalty of *death*, but it provides that if rebels in arms shall not, within sixty days after proclamation by the President, cease to aid and abet the rebellion, and return to their allegiance, they shall be liable to have all their property seized and used for the benefit of the country.

Suppose the rebels in arms refuse to obey the proclamation, and neglect or refuse to return to their allegiance; the mere non-performance of the requisition of this act is, *not levying war*, or aiding and comforting the enemy, technically considered, and so not treason — although, if they go on to perform overt acts in aid of the rebels, *those acts* will be treasonable. Will it be denied that the rebels in arms ought to be required by law to return to their allegiance and cease rebellion? If their refusal to do so is not technically treason, ought they not to be liable to punishment for violating the law? Is any degree of pecuniary loss too severe for those who will continue at war with their country after warning and proclamation, if their lives are not forfeited?

LEGAL CONSTRUCTION OF THE ACT OF 1862.

What will be the construction put upon section 6th of the Act of July 17, ch. 195, 1862, when taken in connection with the joint resolution which accompanied it, is not so certain as it should be. The language of the last clause in that resolution is, "Nor shall any punishment or proceedings, under said Act, be so construed

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as to work a 'forfeiture' of the real estate of the offender beyond his natural life." There is no forfeiture in express terms provided for in any part of the Act. The punishment of treason, in the first section, is either death and freedom of slaves, or imprisonment, fine, and freedom of slaves. The judgment of death for treason is the only one which could, even by the common law, have been so construed as to "work any forfeiture." It may have been the intention of Congress to limit the constructive effect of such a judgment. But the words of the resolution are peculiar; they declare that no "proceedings" under said act shall be so construed as to work a forfeiture, &c. Then the question will arise whether the "proceedings" (authorized by section 6, in which the President has the power and duty to seize and use all the property of rebels in arms who refuse, after warning, to return to their allegiance) are such that a sale of such real estate, under the provisions of sections 7 and 8, can convey any thing more than an estate for the life of the offender? But the crime punished by section 6 is not the *crime of treason;* and whether there be or be not a limitation to the power of the legislature to punish that crime, there is no limit to its power to punish the crime described in this section.*

Forfeiture and confiscation of real and personal estates for crimes, when there was and could have been no treason, were common and familiar penal statutes in several States or colonies when the constitution was framed. Many of the old tories, in the time of the revolution, were *banished,* and their real estate confiscated, without having been tried for or accused of

* See Note, p. 111, *United States* v. *Latham.*

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treason, or having incurred any forfeiture by the laws against treason. Such was the case in South Carolina in 1776.* In that State, one set of laws was in force against treason, the punishment of which was forfeiture *worked by attainder*. Another set of laws were confiscation acts against tory *refugees* who had committed no treason. These distinctions were familiar to those who formed the constitution, and they used language relating to these subjects with technical precision.

THE SEVERITY OF DIFFERENT PUNISHMENTS COMPARED.

Forfeiture and confiscation are, in the eye of the law, less severe punishments than death: they are in effect fines, to the extent to which the criminal is capable of paying them. It would not seem to be too severe a punishment upon a person who seeks, with arms in his hands, to destroy your life, to steal or carry away your property, to subvert your government, that he should be deprived of his property by confiscation or fine to any amount he could pay. Therefore, as the provisions of section 6, which would authorize the seizure and appropriation of rebel real estate to public use, are not within the prohibitions of Art. III. Sect. 3 of the constitution, it is much to be regretted that the joint resolution of Congress should have been so worded as to throw a doubt upon the construction of that part of the statute, if not to paralyze its effect upon the only class of rebel property which they cannot put out of the reach of government, viz., their real estate.†

* See *Willis* v. *Martin*, 2 Bay 20. See also *Hinzleman* v. *Clarke and Al.*, Coxe N. J., 1795.

† See Note to Forty-third Edition, on "Confiscation," p. 406.

In *Bigelow* v. *Forrest* (9 Wallace, 339) the Supreme Court has decided this point. See Appendix, p. 610.

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THE SIXTH SECTION OF THE CONFISCATION ACT OF 1862 IS NOT WITHIN THE PROHIBITION OF THE CONSTITUTION, ARTICLE III. SECTION III.*

Congress cannot, by giving a new name to acts of treason, transcend the constitutional limits in declaring its punishment. Nor can legislation change the true character of crimes. Hence some have supposed that Congress has no right to punish the most flagrant and outrageous acts of civil war by penalties more severe than those prescribed, as they say, for treason. Since a subject must have performed some overt act, which may be construed by courts into the "levying of war," or "aiding the enemy," before he can be convicted of treason, it has been supposed that to involve a great nation in the horrors of civil war can be nothing more, and nothing else, than treason. This is a mistake. The constitution does not define the meaning of the phrase "levying war." Is it confined to the true, and genuine signification of the words, namely, "that to levy war is to raise or begin war; to take arms for attack;" or must it be extended to include the carrying on or waging war, after it has been commenced?† The crime committed by a few individuals by merely *levying* war, or beginning without prosecuting or continuing armed resistance to government, although it is treason, may be immeasurably less than that of carrying on a colossal rebellion, involving millions in a fratricidal contest. Though treason is the highest *political* crime known to the codes of law, yet wide-spread and savage rebellion

* See Notes to Forty-third Edition, p. 425.

† To *levy war* is to *raise* or *begin war*; to take arms for attack; to attack. — *Webster's Quarto Dict.*

To *levy* is, 1. To *raise*, as a siege. 2. To raise or collect; to gather. 3. To *raise*, applied to *war*. — *Worcester's Quarto Dict.*

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is a still higher crime against society; for it embraces a cluster of atrocious wrongs, of which the attack upon government — treason — is but one. Although there can be no treason unless the culprit levies war, or aids the enemy, yet it by no means follows that all acts of carrying on a war once levied are *only* acts of treason. Treason is the threshold of war; the traitor passes over it to new and deeper guilt. He ought to suffer punishment proportioned to his crimes.

It must also be remembered, that the constitution does not indicate that fines, forfeitures, confiscations, outlawry, or imprisonment are "severer penalties than death." The law has never so treated them. Nor is there any limit to the power of Congress to punish traitors, as has been shown in a previous chapter.* Who will contend that the crime of treason is in morals more wicked, in its tendencies more dangerous, or in its results more deadly than the conspiracy by which it was plotted and originated? Yet suppose the conspirator is artful enough not to commit any overt act in presence of two witnesses; he cannot be convicted of treason, though he may have been far more guilty than many thoughtless persons who have been put forward to execute the "overt acts," and have thereby become punishable as traitors. Suppose a person to commit homicide; he may be accused of assault and battery, or assault with intent to kill, or justifiable homicide, or manslaughter, or murder in either degree. Suppose the constitution limited the punishment of wilful murder to the death of the criminal and forfeiture of his real and personal estate for life; would any person contend that neither of the other above-mentioned crimes could

* See Chap. V. p. 93.

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be punished, unless the criminal were convicted of wilful murder? If he had committed murder, he must have committed all the crimes involved in murder. He must have made an assault with intent to kill; and he must have committed unjustifiable homicide, or manslaughter. If the government should, out of leniency, prosecute and convict him of manslaughter, and impose upon him a penalty of fine, or confiscation of his real and personal estate, instead of sentence of death, would any one say that the penalty imposed was severer than death? or that murder was legislated into any other crime? or that any other crime was legislated into murder? Many crimes of different grades may coexist, and culminate in one offence. It is no sign of undue severity to prosecute the offender for one less than the highest. The same course of crime may violate many of the duties the loyal citizen owes to his country. To pass laws declaring the penalty for each and all of these crimes does not transcend the true scope of the criminal legislation of Congress, where an offender has brought upon his country the horrors of civil war by destroying the lives of those who have given him no cause of offence, by violating the rights of the living and the dead, by heaping upon his guilty act the criminality of a thousand assassins and murderers, and by striking at the root of the peace and happiness of a great nation; it does not seem unduly severe to take from him his property and his life. The constitution does not protect him from the penalty of death; and it cannot be so interpreted as to protect him against confiscation of his real estate.

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TREASON AND CONFISCATION LAWS IN 1862. THEIR PRACTICAL OPERATION.

To understand the practical operation of the statutes now in force for the punishment of treason and rebellion, and for the seizure and confiscation of rebel property, it is necessary to observe the effect of other statutes which regulate the modes of procedure in the United States courts. Section 1 of the act of 1862, which, as well as the act of 1790, prescribes the punishment of death for treason; section 2, which imposes fines and penalties; section 3, which adds disqualification for office; and, in fact, all the penal sections of this statute, — entitle the accused to a judicial trial. Before he can be made liable to suffer any penalty, he must have been "pronounced guilty of the offence charged," and he must have suffered "judgment and sentence on conviction." The accused cannot by law be subjected to a trial unless he has previously been indicted by a grand jury. He cannot be adjudged guilty unless upon a verdict of a petit jury, impanelled according to law, and by courts having jurisdiction of the person and of the alleged offence. A brief examination of the statutes regulating such proceedings will show that treason and confiscation laws will not be likely to prove effectual, unless they shall be amended, or unless other statutes shall be so modified as to adapt them to the present condition of the country.*

LEGAL RIGHTS OF PERSONS ACCUSED OF TREASON.

All judicial convictions must be in accordance with the laws establishing the judiciary and regulating its proceedings. Whenever a person accused of crime is held by the government, not as a belligerent or prisoner

* See notes to p. 130.

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of war, but merely as a citizen of the United States, then he is amenable to, and must be tried under and by virtue of, standing laws; and all rights guaranteed to other citizens in his condition must be conceded to him.

WILL SECESSIONISTS INDICT AND CONVICT EACH OTHER?

No person can lawfully be compelled to appear and answer to a charge for committing capital or otherwise infamous crimes, except those arising in the army and navy, when in actual service, in time of war or public danger, until he has been indicted by a grand jury.* That grand jury is summoned by the marshal from persons in the district where the crime was committed.

By the statute of September 24, 1789, section 29, "in all cases punishable with death, the trial shall be had in the county where the offence was committed; or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence." It has indeed been decided that the judges are not obliged to try these cases in the county where the crime was committed, but they are bound to try them within the district in which they were perpetrated.†

HOW THE JURIES ARE SELECTED, AND THEIR POWERS.

The juries are to be designated by lot, or according to the mode of forming juries practised in 1789, so far as practicable: the qualifications of jurors must be the same as those required by the laws of the State where

* Constitutional Amendment V.

† *United States* v. *Wilson*, Baldw. 117; *United States* v. *Cornell*, 2 Mass. 95-98; *United States* v. *The Insurgents*, 3 Dall. 518.

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the trial is held, in order to qualify them to serve in the highest court of that State; and jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial. And if so many jurors are challenged as to prevent the formation of a full jury, for want of numbers, the panel shall be completed from the bystanders.

STATE RIGHTS AND SECESSION DOCTRINES IN THE JURY ROOM.

Juries, in criminal trials, are judges of the law and of the facts, according to the opinion of eminent legal authorities. Whether this be so or not, their verdicts, in such cases, are rendered in accordance with their views of the law, whether right or wrong Suppose that the judge presiding at the trial is honest and loyal, and that the jury is composed of men who believe that loyalty to the State is paramount to loyalty to the United States; or that the States had, and have, a lawful right to secede from the Union. Whatever the opinions of the judge presiding in the United States court might be on these questions, he would have no power to root out from the jury their honest belief, that obedience to the laws of their own seceding State is not, and cannot be, treason. The first step towards securing a verdict would be to destroy the belief of the jury in these doctrines of State rights, paramount State sovereignty, and the right of secession. To decide the issue, according to the conscientious judgment of the jurymen upon the facts and the law, would require them to find a verdict against the United States.

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SYMPATHY.

But this is not the only difficulty in the operation of this statute. The grand jurors and the petit jury are to be drawn from those who are neighbors, and possibly friends, of the traitors. The accused has the further advantage of knowing, before the time of trial, the names of all the jurors, and of all the witnesses to be produced against him; he has the benefit of counsel, and the process of the United States to compel the attendance of witnesses in his behalf.* How improbable is it that any jury of twelve men will be found to take away the lives or estates of their associates, when some of the jurymen themselves, or their friends and relatives or debtors, are involved in the same offence! Could any judge reasonably expect a jury of horse thieves to convict one of their own number, when either of the jurymen might be the next man required to take his turn in the criminal box? Under the present state of the law, it is not probable that there will ever be a conviction, even if laws against treason, and those which confiscate property, were not unpopular and odious in a community against whom they are enacted. When an association of traitors and conspirators can be found to convict each other, then these statutes will punish treason, but not sooner.†

LAWS ARE MOST EFFECTIVE WHICH REQUIRE NO REBEL TO ADMINISTER THEM.

Those sections of the act of 1862, empowering government to seize rebel property, real, personal, and mixed, and to apply it to the use of the army, to secure the condemnation and sale of seized property, so as to make it available, and to authorize proceedings *in rem*,

* Statute of April 30, 1790, Sect. 29.

Note to Forty-third Edition. — Not one life has yet (1870) been forfeited by any judicial proceeding under the laws of the United States against treason committed during the late rebellion, which terminated in 1865.

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conformably to proceedings in admiralty or revenue cases, are of a different and far more effective character. Those clauses in the act which allow of the employment in the service of the United States of colored persons, so far as they may be serviceable, and the freeing of the slaves of rebels, whether captured, seized, fugitive, abandoned, or found within the lines of the army, may be of practical efficacy, because these measures do not require the aid of any secession jury to carry them into effect.*

STATUTES OF LIMITATION WILL PROTECT TRAITORS.

The statutes limiting the time during which rebels and traitors shall be liable to indictment ought also to be considered. By the act of 1790, no person can be punished unless indicted for treason within three years after the treason was committed, if punishable capitally; nor unless indicted within two years from the time of committing any offence punishable with fine or forfeiture. Thus, by the provisions of these laws, if the war should last two years, or if it should require two or three years after the war shall have been ended to reëstablish regular proceedings in courts, all the criminals in the seceded States will escape by the operation of the statutes of limitations. It is true, that if traitors flee from justice these limitations will not protect them; but this exception will apply to few individuals, and those who flee will not be likely to be caught. Unless these statutes are modified, those who have caused and maintained the rebellion will escape from punishment.†

* See Note to the Forty-third Edition: "The United States may call on all its Subjects to do Military Duty." pp. 478–493.

† *Note to Tenth Edition.* — Several bills were introduced during the session of Congress (1863–64) to remedy the difficulties here pointed out.

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CHAPTER VIII.

INTERFERENCE OF GOVERNMENT WITH THE DOMESTIC AFFAIRS OF THE STATES.

PARTY PLATFORMS CANNOT ALTER THE CONSTITUTION.*

POLITICAL parties, in times of peace, have often declared that they do not intend to interfere with slavery in the States. President Buchanan denied that government had any power to coerce the seceded States into submission to the laws of the country. When President Lincoln called into service the army and navy, he announced that it was not his purpose to interfere with the rights of loyal citizens, nor with their domestic affairs. Those who have involved this country in bloody war, all sympathizers in their treason, and others who oppose the present administration, unite in denying the right of the President or of Congress to interfere with slavery, even if such interference is the only means by which the Union can be saved from destruction. No constitutional power can be obliterated by any denial or abandonment thereof, by individuals, by political parties, or by Congress.

The war power of the President to emancipate enemy's slaves has been the subject of a preceding chapter. Congress has power to pass laws necessary and proper to provide for the defence of the country in time of war, by appropriating private property to public use, with just compensation therefor, as shown in Chapter I.; also laws enforcing emancipation, confiscation, and all other belligerent rights, as shown in Chapter II.; and

* *Note to Forty-third Edition.* — See the political platforms of the Republican and of the Democratic parties during the contest for the presidency between Mr. Lincoln and Mr. Douglas. Also, the Resolutions of Congress referred to in note to page 133. Also, the Note on "Slavery," pp. 393–400.

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it is the sole judge as to what legislation, to effect these objects, the public welfare and defence require; it may enact laws abolishing slavery, whenever slavery, ceasing to be *merely* a private and domestic relation, becomes a matter of *national* concern, and the public welfare and defence cannot be provided for and secured without interfering with slaves. Laws passed for that purpose, in good faith, against belligerent subjects, not being within any express prohibition of the constitution, cannot lawfully be declared void by any department of government. Reasons and authority for these propositions have been stated in previous chapters.

DOMESTIC INSTITUTIONS.

Among the errors relating to slavery which have found their way into the public mind, — errors traceable directly to a class of politicians who are now in open rebellion, — the most important is, that *Congress has no right to interfere in any way with slavery.* Their assumption is, that the States in which slaves are held are alone competent to pass any law relating to an institution which belongs exclusively to the domestic affairs of the States, and in which Congress has no right to interfere in any way whatever.*

From a preceding chapter, (see page 17,) it will be seen, that if slaves are *property*, property can be interfered with under the constitution; if slavery is a *domestic* institution, as *Mormonism* or *apprenticeship* is, each of them can law-

* *Note to Forty-third Edition.* — Not long before this essay was first published, Congress had passed by a *unanimous* vote the following declaratory resolution: "*Resolved*, That neither the Federal government, nor the people, nor the governments of the non-slaveholding States have the right to legislate upon or interfere with slavery in any of the slaveholding States of the Union;" and had proposed to amend the Constitution so that Art. XIII. would have read as follows: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of such State."

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fully be interfered with and annulled. But slavery has a double aspect. So long as it remains in truth "*domestic*," that is to say, according to Webster's Dictionary, "*pertaining to house or home*," so long government cannot be affected by it, and have no ground for interfering with it; when, on the contrary, it no longer pertains only to house and home, but enters into vital questions of war, aid and comfort to public enemies, or any of the national interests involved in a gigantic rebellion; when slavery, rising above its comparative insignificance as a household affair, becomes a vast, an overwhelming power which is used by traitors to overthrow the government, and may be used by government to overthrow traitors, it then ceases to be *merely* domestic; it becomes a *belligerent power*, acting against the "public welfare and common defence." No institution continues to be simply "domestic" after it has become the effective means of aiding and supporting a public enemy.

When an "institution" compels three millions of subjects to become belligerent traitors, because they are slaves of disloyal masters, slavery becomes an affair which is of the utmost public and national concern. But the constitution *not only empowers*, but, under certain contingencies, *requires* slavery in the States to be interfered with. No one who will refer to the sections of that instrument here cited, will probably venture to deny the power of Congress, in one mode or another, to *interfere* for or against the institution of slavery.

CONGRESS MAY PASS LAWS INTERFERING FOR THE PRESERVATION AND PROTECTION OF SLAVERY IN THE STATES.

Art. IV. Sect. 2, required that fugitive slaves should be *delivered up*, and the fugitive slave laws were passed to carry this clause into effect.

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Art. I. Sect. 9, required that the foreign slave trade should not be interfered with prior to 1808, but allowed an importation tax to be levied on each slave, not exceeding ten dollars per head.

Art. V. provided that no amendment of the constitution should be made, prior to 1808, affecting the preceding clause.

Art. I. Sect. 2 provides that three fifths of all slave shall be included in representative numbers.

CONGRESS MAY INTERFERE AGAINST SLAVERY IN THE STATES.

Art. I. Sect. 8. Congress has power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Under this clause Congress can in effect prohibit the *inter-state slave trade*, and so pass laws diminishing or destroying the value of slaves in the border States, and practically *abolish slavery* in those States.

CONGRESS MAY INTERFERE WITH SLAVERY BY CALLING UPON THE SLAVES, AS SUBJECTS, TO ENTER MILITARY SERVICE.

Art. I. Sect. 8. Congress has the power to declare war and make rules for the government of land and naval forces, and under this power to decide who shall *constitute the militia of the United States*, and to enrol and compel into the service of the United States *all the slaves*, as well as their masters, and thus to interfere with slavery in the States.

CONGRESS MAY INTERFERE WITH SLAVERY IN THE STATES BY CUTTING OFF THE SUPPLY OF SLAVES TO SUCH STATES.

The law now prohibiting the importation of slaves, and making slave trading piracy, is an interference with slavery, by preventing their introduction into the

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slave States. So also is the treaty with England to suppress the slave trade, and to keep an armed naval force on the coast of Africa.

In case of servile insurrection against the laws and authority of the United States, the government *are bound to interfere with slavery*, as much as in an insurrection of their masters, which may also require a similar interference. The President, with the advice and consent of the Senate, has the power to make treaties; and, under the treaty-making power, slavery can be and has been interfered with. In the last war with Great Britain, a treaty was made to evacuate all the forts and places in the United States without carrying away any of the slaves who had gone over to them in the States. Congress then interfered to *sustain* the institution of slavery, for it was only by *sustaining* slavery that this government could claim indemnity for slaves as *property*. The *treaty-making power* may abolish slavery in the whole country, as, by Art. VI., the constitution, the laws, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land. A clause in any treaty abolishing slavery would, *ipso facto*, become the supreme law of the land, and there is no power whatever that could interfere with or prevent its operation. By the treaty-making power, any part of the country burdened with slavery, and wrested from us by conquest, could be ceded to a foreign nation who do not tolerate slavery, and without claim of indemnity. The principle is well established that "the release of a territory from the dominion and sovereignty of the country, if that cession be the result of coercion or conquest, does not impose any obligation upon the

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government to indemnify those who may suffer loss of property by the cession." *

The State of New York had granted to her own citizens many titles to real estate lying in that part of her territory now called Vermont. Vermont separated itself from New York, and declared itself an independent State. It maintained its claims to such an extent, that New York, by act of July 14, 1789, was enforced to empower commissioners to assent to its independence; but refused to compensate persons claiming lands under grant from New York, though they were deprived of them by Vermont. The ground taken by the legislature was, that the government was not required to assume the burden of losses produced by conquest or by the violent dismemberment of the State.

Supposing England and France should, by armed intervention, compel the dismemberment of the United States, and the cession of the slave States to them as conquered territory; and that the laws of the conquerors allowed no slaveholding. Could any of the citizens of slave States, who might reside in the free States, having remained loyal, but having lost their slaves, make just legal claim for indemnity upon the government? Certainly not.

Other instances may be cited in which Congress has the power and duty of interference in the local and domestic concerns of States, other than those relating to slavery.† Chief Justice Taney says, —

"Moreover, the constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department. Art. IV. Sect. 4 of the constitution of the United States provides that the United States shall guarantee to

* 1 Kent Com. 178.

† *Luther* v. *Borden*, 7 How. 42.

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every State in the Union a republican form of government, and shall protect each of them against invasion, and, on the application of the legislature, or of the executive when the legislature cannot be convened, against *domestic violence.* Under this article of the constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established, before it can determine whether it is republican or not. And when senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority, and its decision is binding upon every other department of the government, and could not be questioned in a judicial tribunal. So, too, as relates to the clause in the above-mentioned article of the constitution, providing for cases of *domestic* violence. It rested with Congress, too, to determine the means proper to be adopted to fulfil this guaranty."

Suppose, then, that for the purpose of securing "*domestic tranquillity*" and to suppress *domestic violence*, Congress should determine that emancipation of the slaves was a necessary and proper means, it would be the duty of Congress to adopt those means, and thus to interfere with slavery.* If a civil war should arise in a single State between the citizens thereof, it is the duty of Congress to cause *immediate interference* in the domestic and local affairs of that State, and to put an end to the war; and this interference may be by force of arms and by force of laws; and the fact that the cause of quarrel is domestic and private, whether it be in relation to a proposed change in the form of government, as in Dorr's rebellion,* or a rebellion growing out of any other domestic matter, the constitution authorizes and requires interference by the general government. Hence it is obvious that if slaves be considered prop-

* See *Luther* v. *Borden*, 7 How. 42.

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erty, and if the regulation of slavery in the States be deemed in some aspects one of the domestic affairs of the States where it is tolerated, yet these facts constitute no reason why such property may not be interfered with, and slavery dealt with by government according to the emergencies of the time, whenever slavery assumes a new aspect, and rises from its private and domestic character to become a matter of national concern, and imperils the safety and preservation of the whole country. We are not to take our opinions as to the extent or limit of the powers contained in the constitution from partisans, or political parties, nor even from the dicta of political judges. We should examine that instrument in the light of history and of reason; but when the language is plain and clear, we need no historical researches to enable us to comprehend its meaning. When the interpretation depends upon technical law, then the contemporary law writers must be consulted. The question as to the meaning of the constitution depends upon what the people, the plain people who adopted it, intended and meant at the time of its adoption.

AUTHORITATIVE CONSTRUCTION OF THE MEANING OF THE CONSTITUTION.

The conclusive authority on its interpretation is the document itself. When questions have arisen under that instrument, upon which the Supreme Court have decided, and one which they had a right to decide, their opinion is, for the time being, the supreme authority, and remains so until their views are changed and new ones announced; and as often as the Supreme Court change their judgments, so often the authoritative

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interpretation of the constitution changes. The Supreme Court have the right to alter their opinions every time the same question is decided by them; and as new judges must take the place of those whose offices are vacated by death, resignation, or impeachment, it is not unlikely that opinions of the majority of the court may, upon constitutional as well as upon other questions, be sometimes on one side and sometimes on the other.

Upon political discussions, such as were involved in the Dred Scott case, the judges are usually at variance with each other; and the view of the majority will prevail until the majority is shifted. The judges are not legally bound to adhere to their own opinions, although litigants in their courts are. Whenever the majority of the court has reason to overrule a former decision, they not only have the right, but it is their duty, to do so.

The opinions of the framers of the constitution are not authority, but are resorted to for a more perfect understanding of the meaning they intended to convey by the words they used; but after all, the words should speak for themselves; for it was the language in which that instrument was worded that was before the people for discussion and adoption. We must therefore go back to that original source of our supreme law, and regard as of no considerable authority the platforms of political parties who have attempted to import into the constitution powers not authorized by fair interpretation of its meaning, or to deny the existence of those powers which are essential to the perpetuity of the government.

A political party may well waive a legal constitutional right, as matter of equity, comity, or public pol-

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icy; and this waiver may take the form of a denial of the existence of the power thus waived. In this manner Mr. Douglas not merely waived, but denied, the power of Congress to interfere with slavery in the territories; and in the same way members of the Republican party have disclaimed the right, in time of peace, to interfere with slavery in the States; but such disclaimers, made for reasons of state policy, are not to be regarded as enlarging or diminishing the rights or duties devolved on the departments of government, by a fair and liberal interpretation of all the provisions of the constitution.

Rising above the political platforms, the claims and disclaimers of Federalists, Democrats, Whigs, Republicans, and all other parties, and looking upon the constitution as designed to give the government made by the people, for the people, the powers necessary to its own preservation, and to the enforcement of its laws, it is not possible justly to deny the right of government to interfere with slavery, Mormonism, or any other institution, condition, or social status into which the subjects of the United States can enter, whenever such interference becomes essential as a means of "public welfare or common defence in time of war." *

* In several preceding chapters other branches of this subject have been discussed. See note to page 132.

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NOTES ON THE WAR POWERS.

FIFTH EDITION.

MANY of the leading doctrines contained in the foregoing pages have received, since the publication of the fourth edition, the sanction of the Supreme Court of the United States, of whose authoritative and final decision in the prize cases, argued in the spring of 1863, the following is the substance: —

IN THE SUPREME COURT OF THE UNITED STATES. — Claimant of schooners *Brilliant*, *Crenshaw*, barque *Hiawatha* and others, appellants, *vs.* United States.

These causes came up by appeal from decrees *in prize*, of the Circuit Courts for the Southern District of New York, and the District of Massachusetts, affirming respectively the sentences of condemnation passed upon the vessels and cargoes by the District Courts for said districts. The following opinion is confined to the general questions of law which were raised by *all* the cases. It does not discuss the *special facts* and circumstances of the respective cases.

March 9th, 1863. Opinion of the Court by GRIER, J.

There are certain propositions of law which must necessarily affect the ultimate decision of these cases and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each. They are, —

First. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

Second. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "*enemies' property*"?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion for the purpose of subduing the enemy.

That a blockade *de facto* actually existed and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases. That the President, as the executive chief of the government, and commander-in-chief of the army and navy, was the proper person to make such notification, has not been, and cannot be, disputed.

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel, or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state

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of *war* existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be "*that state in which a nation prosecutes its right by force.*" The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion; but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupies and holds in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or, at least, suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies — two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms. This being the case, it is very evident that the common laws of war, those maxims of humanity, moderation, and honor, ought to be observed by both parties in every civil war. Should the sovereign conceive that he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will be cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, *civil war exists*, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land." By the constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the constitution. The constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war, either against a foreign nation or a domestic State. But by the acts of Congress

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of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia, and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less *a war*, although the declaration of it be "*unilateral*." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge, to be accepted or refused at pleasure by the other."

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged, in order to constitute it a party belligerent in a war, according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of *Santissima Trinidad*, 7 Wheaton, 337, this Court says, "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." See also 3 Binn., 252.

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declarations, or silent acquiescence, by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war, with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its powers by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now, for the first time, desired to pronounce, to wit: —

That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors*; and

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a war levied on the government by traitors, in order to dismember and destroy it, is not *a war*, because it is an "insurrection."

Whether the President, in fulfilling his duties as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided *by him;* and this Court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances, peculiar to the case. The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in passing laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress, "*ex majore cautela,*" passing an act, approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., "as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain, if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that the well-known principle of law, "*Omnis ratihabitio retrotrahitur et mandato equiparatur,*" this ratification has operated to perfectly cure the defect.

In the case of Brown *vs.* United States, 8 Cranch, 131, 132, 133, Mr. Justice Story treats of this subject, and cites numerous authorities, to which we may refer, to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did. I would ask if the sovereign may not ratify his proceedings; and then, by a retroactive operation, give validity to them."

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question, therefore, we are of opinion that the President had a right *jure belli* to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "*enemies' property*"?

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property," whether the owner be in arms against the government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war.

Money and wealth, the products of agriculture and commerce, are said to

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be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term *enemies* is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the Common Law, which say, "that persons who wage war against the king may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party, and its "*de facto* government," to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a correlative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance, and made *war* against the government by treasonably resisting its laws.

They contend also that insurrection is the act of individuals, and not of a government or sovereignty; that the individuals engaged are subjects of law; that confiscation of their property can be effected only under municipal law; that, by the law of the land, such confiscation cannot take place without the conviction of the owner of some offence; and finally, that the secession ordinances are nullities, and ineffectual to release any citizen from his allegiance to the national government; consequently, the constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations.

It assumes that where a civil war exists, the party belligerent claiming to be sovereign cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field, or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "*unconstitutional*"!!! Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights. (See 4 Cranch, 272.) Treating the other party as a belligerent, and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity.

We have shown that a civil war, such as that now waged between the Northern and Southern States, is properly conducted, according to the humane regulations of public law, as regards capture on the ocean.

Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the Federal government, they owe also a qualified allegiance to the State in which they are domiciled; their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have *acted as States*, claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the

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Federal government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary, marked by lines of bayonets, and which can be crossed only by force. South of this line is enemy's territory, because it is claimed and held in possession by an organized, hostile, and belligerent power.

All persons residing within this territory, whose property may be used to increase the revenues of the hostile power, are in this contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance, and made war on their government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public as distinguished from the common law.

Whether property be liable to capture as "enemies' property," does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen." 8 Cranch, 384. "The owner *pro hac vice* is an enemy." 3 Wash. C. C. R. 183.

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, is always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within its territory. (See Upton, chap. 3d, et cas. cit.)

The foregoing opinion of the highest judicial tribunal of the United States was delivered by Mr. Justice Grier, and was concurred in by Justices Wayne, Swayne, Miller, and Davis. An opinion was delivered by Mr. Justice Nelson, and concurred in by Chief Justice Taney, and Justices Clifford and Catron, who differed from the majority of the Court upon the question, "whether our *civil war* began *before July* 13, 1861?" the majority holding the affirmative, and the minority the negative.

Both opinions sanction many of the doctrines of international, constitutional, and belligerent law set forth in the treatise on the "*War Powers of the President, and the Legislative Power of Congress.*"

Mr. Justice NELSON, dissenting. The property in this case, vessel and cargo, was seized by a government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. The Hiawatha was a British vessel, and the cargo belonged to British subjects. The vessel had entered the James River before the blockade, on her way to City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where, the blockade in the mean time having been established, she was met by one of the ships, and the boarding officer indorsed on her register, "Ordered not to enter any port in Virginia, or south of it." This occurred some three miles above the place where the flag ship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag-ship, which was done, when she was taken in charge as prize.

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On the 30th of April, flag-officer Pendergrast, U. S. ship Cumberland, off Fortress Monroe, in Hampton Roads, gave the following notice: "All vessels passing the capes of Virginia, coming from a distance and ignorant of the proclamation (the proclamation of the President of the 27th of April that a blockade would be established), will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination."

The Hiawatha, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British Minister and the Secretary of State, under date of the 8th and 9th of May, which drew from the Secretary of the Navy a letter of the 9th, in which, after referring to the above notice of the flag officer Pendergrast, and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the Minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British Minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be ladened within the time. This vessel, according to the advice of the Secretary, would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was delayed in her departure for want of a tug to tow her down the river.

We think it very clear, upon all the evidence, that there was no intention on the part of the master to break the blockade; that the seizure under the circumstances was not warranted, and upon the merits, that the ship and cargo should have been restored.

Another ground of objection to this seizure is, that the vessel was entitled to a warning indorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the President; and that she was not liable to capture except for the second attempt to leave the port.

The proclamation, after certain recitals, not material in this branch of the case, provides as follows: the President has "deemed it advisable to set on foot a blockade of the ports within the States aforesaid (the States referred to in the recitals), in pursuance of the laws of the United States and of the law of nations, in such case made and provided." "If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning, and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable."

The proclamation of the President of the 27th of April extended that of the 19th to the States of Virginia and North Carolina.

It will be observed that this warning applies to vessels attempting to enter or leave the port, and is therefore applicable to the Hiawatha.

We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this proclamation.

It has been said that the proclamation, among other grounds, as stated on its face, is founded on the "law of nations," and hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the

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proclamation is issued and the terms prescribed as the condition of its penalties or enforcement, and, besides, if founded upon the law of nations, surely it was competent for the President to mitigate the rigors of that code, and apply to neutrals the more lenient and friendly principles of international law. We do not doubt but that considerations of this character influenced the President in prescribing these favorable terms in respect to neutrals; for, in his message a few months later to Congress (4th July), he observes, "a proclamation was issued for closing the ports of the insurrectionary districts" (not by blockade, but) "by proceedings *in the nature of a blockade.*"

This view of the proclamation seems to have been entertained by the Secretary of the Navy, under whose orders it was carried into execution. In his report to the President, 4th July, he observes, after referring to the necessity of interdicting commerce at those ports where the government were not permitted to collect the revenue, that "in the performance of this domestic municipal duty the property and interests of foreigners became, to some extent, involved in our home questions, and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or non-intercourse of the insurgent States. The commanders, he observes, were directed to permit the vessels of foreigners to depart within fifteen days as in case of actual effective blockade, and their vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning."

The question is not a new one in this Court. The British government had notified the United States of the blockade of certain ports in the West Indies, but "not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and, then, not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them."

The question arose upon this blockade in *Mar. In. Co.* vs. *Woods* (6 Cranch, 29).

Chief Justice Marshall, in delivering the opinion of the court, observed, "The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off."

We are of opinion, therefore, that, according to the very terms of the proclamation, neutral ships were entitled to a warning by one of the blockading squadron, and could be lawfully seized only on the second attempt to enter or leave the port.

It is remarkable, also, that both the President and the Secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the government.

Another objection taken to the seizure of this vessel and cargo is, that

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there was no existing war between the United States and the States in insurrection, within the meaning of the law of nations, which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war; and, when duly commenced, by proclamation or otherwise, it entitles both of the belligerent parties to all the rights of war against each other and as respects neutral nations. Chancellor Kent observes, "Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things." "Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them." He further observes, "As a war cannot lawfully be commenced on the part of the United States without an act of Congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration."

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other — all intercourse, commercial or otherwise, between them unlawful — all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects, of the two countries are dissolved, and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land (*Brown* vs. *United States*, 8 Cranch, 110), all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal geanted as rights of war, and the law of prizes, as defined by the law of nations, comes into full and complete operation, resulting from maritime captures, *jure belli*. War also effects a change in the mutual relations of all states or countries, not directly, as in the case of the belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war: and hence the same code, which has annexed to the existence of a war all these disturbing consequences, has declared that the right of making war belongs exclusively to the supreme or sovereign power of the state.

This power, in all civilized nations, is regulated by the fundamental laws or municipal constitution of the country.

By our Constitution this power is lodged in Congress. Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war, when recognized or declared by the competent power.

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In the case of a rebellion, or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may, by the competent power, recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war, "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this government at the time this vessel and cargo were seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the Constitution of the United States, and which will draw after it belligerent rights, it must be recognized or declared by the war-making power of the government. No power short of this can change the legal status of the government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the government must be exercised before this changed condition of the government and people and of neutral third parties can be admitted. There is no difference in this respect between a civil or a public war.

We have been more particular upon this branch of the case than would seem to be required on account of any doubt or difficulties attending the subject, in view of the approved works upon the law of nations or from the adjudication of the courts, but, because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation, enemies' property captured, blockades set on foot, and all the rights of war enforced in prize courts, by a species of war unknown to the law of nations and to the Constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war, was organized hostility in the district of country in a state of rebellion; that conflicts on land and on sea, the taking of towns and capture of fleets, in fine, the magnitude and dimensions of the resistance against the government, constituted war, with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the Confederate States to enable them to resist the authority of the general government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won; that in the language of one of the learned counsel, "Whenever the situation of opposing hostilities has assumed the proportions and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended, and war in fact and by necessity is the *status* of the nation until peace is restored and the laws resumed their dominion."

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war, in a legal sense, in the sense of

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the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general government, the inquiry should be into the law of nations and into the municipal fundamental laws of the government. For we find there, that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized, or declared by the sovereign power of the state, and which sovereign powers by our Constitution is lodged in the Congress of the United States; — civil war, therefore, under our system of government, can exist only by an act of Congress, which requires the assent of two of the great departments of the government, the Executive and Legislative.

We have thus far been speaking of the war power under the Constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the President in the recess of Congress, and until that body could be assembled?

The framers of the Constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the Convention was in session, and which had become so general that it was quelled only by calling upon the military power of the State. The Constitution declares that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Another clause, "that the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;" and, again, "he shall take care that the laws shall be faithfully executed." Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last Act provided that whenever the United States shall be invaded, or be in imminent danger of invasion from a foreign nation, it shall be lawful for the President to call forth such number of militia most convenient to the place of danger, and in case of insurrection in any State against the government thereof, it shall be lawful for the President, on the application of the Legislature of such State, if in session, or if not, of the Executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides, that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the President to call forth the militia of such State, or of any other State or States as may be necessary to suppress such combinations; and by the Act 3 March, 1807 (2 U. S. Laws, 443), it is provided that in case of insurrection or obstruction of the laws, either in the United States or of any State or Territory, where it is lawful for the President to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the Constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home or invasion from abroad. The

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whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship of war, or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations; and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the Acts of Congress as war measures, with all the rights of war.

It has been argued that the authority conferred on the President by the Act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the Constitution, and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not? It has also been argued that this power of the President from necessity should be construed as vesting him with the war power, or the Republic might greatly suffer or be in danger from the attacks of the hostile party before the assembling of Congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the government. The truth is, this idea of the existence of any necessity for clothing the President with the war power, under the Act of 1795, is simply a monstrous exaggeration; for, besides having the command of the whole of the army and navy, Congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive. Congress alone can determine whether war exists or should be declared; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offence against a

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law of Congress passed before the act was committed, which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their coöperation in putting down the insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted, and all ships and cargoes belonging to the inhabitants subjected to forfeiture, as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the King, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in Prize Courts as rights of war, took place until after the passage of the Act of Parliament. Until the passage of the act the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize of their property as if the same were the property "of open enemies." For the first time the distinction was obliterated.

So the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their coöperation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war, which would draw after it all the rights of a belligerent, but in the case of the President no such power existed; the war therefore from necessity was a personal war, until Congress assembled and acted upon this state of things.

Down to this period the only enemy recognized by the government was the persons engaged in the rebellion; all others were peaceful citizens, entitled to all the privileges of citizens under the Constitution. Certainly it cannot rightfully be said that the President has the power to convert a loyal citizen into a belligerent enemy, or confiscate his property as enemy's property.

Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the President was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection, and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to

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any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. Act of Congress of 13th of July, 1861, secs. 5, 6. The 4th section also authorized the President to close any port in a Collection District obstructed so that the revenue could not be collected, and provided for the capture and condemnation of any vessel attempting to enter.

The President's Proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida.

This Act of Congress, we think, recognized a state of civil war between the government and the Confederate States, and made it territorial. The Act of Parliament of 1776, which converted the rebellion of the Colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government, in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection, usually modifies its effects with a view, as far as practicable, to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence; hence the modification in the Act of Parliament declaring the territorial war.

It is found in the 44th section of the Act, which, for the encouragement of well affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, port, or place, at peace with his majesty, and after such notice by proclamation there should be no further captures. The Act of 13th of July provides that the President may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection (§ 5), obviously intending to favor loyal citizens, and encourage others to return to their loyalty. And the 8th section provides that the Secretary of the Treasury may mitigate or remit the forfeitures and penalties incurred under the act. The Act of 31st July is also one of a kindred character. That appropriates $2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened. We agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the government and the people of the States described in that proclamation.

The cases of the *United States* vs. *Palmer* (3 Wh. 610); *Divina Pastora*, and 4 Ibid, 52, and that class of cases to be found in the reports are referred to as furnishing authority for the exercise of the war power claimed for the President in the present case. These cases hold that when the government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the courts are bound to consider as lawful all those acts which the new government may direct against the enemy; and we admit the President, who conducts the foreign relations of the government, may fitly recognize, or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is, whether the President can recognize or declare a civil war, under the Constitution, with all its belligerent rights, between his own government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to Congress. We agree, when such a war is recognized or

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declared to exist by the war-making power, but not otherwise, it is the duty of the courts to follow the decision of the political power of the government.

The case of *Luther* vs. *Borden, et al.* (7 How., 45), which arose out of the attempt of an assumed new government in the State to overthrow the old and established government of Rhode Island by arms. The Legislature of the old government had established martial law, and the Chief Justice, in delivering the opinion of the court, observed, among other things, that "if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition."

But it is only necessary to say, that the term "war" must necessarily have been used here by the Chief Justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the Federal Constitution to declare war.

Congress, on the 6th of August, 1862, passed an Act confirming all acts, proclamations, and orders of the President, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war, with all the rights of capture and confiscation, *jure belli*, from the date referred to. An *ex post facto* law is defined, when, after an action, indifferent in itself, or lawful, is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words trade and commerce authorized at the time by acts of Congress and treaties, may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Element of Int. Law, pt. 4, ch. 1, sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any constitutional authority, and void; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this government and the States in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all

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cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

Mr. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice CLIFFORD, concurred in the Dissenting Opinion of Mr. Justice NELSON.

From the foregoing opinion of the judges who dissented from the opinion of the majority of the Court, it will be seen that the Court were *unanimous* on several great questions treated of in the preceding work. The judges all agree in considering *a civil war* (with all the *consequences* to *the residents of the seceding States* of a *public territorial war*) to have existed *since the act of July 13th*, 1861, and *still to exist.* The question on which the judges differed was, whether the rebellion was or was not a civil territorial war *prior to this Act of Congress.*

Among the points thus authoritatively settled by agreement of all the judges, are these: —

1. *Since* July 13th, 1861, there has existed between the United States and the Confederate States *a civil, territorial war.*

2. That the United States, since that time, have *full belligerent rights against all persons residing in the rebellious districts.*

3. That whether the inhabitants of the rebellious districts are guilty or innocent, loyal or disloyal, such persons are, in the eye of the law, *belligerent enemies,* and *they and their property are subject to the laws of war.* "The laws of war, whether the war be civil or *inter gentes,* converts *every citizen* of the hostile State into a *public enemy,* and treats him accordingly, whatever may have been his previous conduct."

4. All *the rights of war* now may be *lawfully* and *constitutionally* exercised against all the *inhabitants* of the seceded States.

The following extract from the same opinion shows what *some* of these *belligerent rights* are: —

"The legal consequences resulting from a state of war between two countries, at this day, are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries immediately *become enemies* of each other; *all intercourse, commercial or otherwise,* between them *unlawful;* all contracts existing at the commencement of the war *suspended,* and all *made during its existence utterly void.* The insurance of enemies' property, the drawing of bills of exchange or purchase in the enemy's country, the remission of bills or money to it, are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and in fine, *interdiction of trade and intercourse, direct or indirect,* is absolute *and complete* by the *mere force and effect of war itself. All the property of the people of the two countries, on land or sea, is subject to capture and confiscation by the adverse party,* as *enemies' property,* with certain qualifications as it respects property on land. (8 Cranch, 110, *Brown* vs. *United States.*) *All treaties between the belligerent parties are annulled.* The *ports* of the respective countaies may be blockaded, and *letters of marque* and reprisal granted as rights of war, and the *law of prize,* as defined by the law of nations, comes into full and complete operation, resulting from maritime captures *jure belli.* War also effects a change in the *mutual relations of all States or countries,* not directly, as in case of belligerents, but immediately and indirectly, though they take no part in the contest, but remain neutral.

"The great and pervading change in the condition of a country, *and in the relations of all her citizens and subjects, external and internal,* from a state of peace, is the immediate effect and result of a state of war."

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MILITARY ARRESTS

IN

TIME OF WAR.

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PREFACE TO MILITARY ARRESTS.

In November, 1862, when the author was first requested by the Government to act as Solicitor and special counsel of the War Department, civil suits and criminal prosecutions were pending against military officers and other persons who, acting under orders of the War Department, had arrested and detained in custody citizens of the United States, and aliens. It was a part of the duty assigned to him to instruct counsel employed in different parts of the country for the defence of those who had been wrongfully subjected to such proceedings by reason of their obedience to orders. As time advanced, suits and prosecutions multiplied, involving men in high position. Treason reared its head in many shapes and in many places in the Northern States. Attempts were constantly made to bring the judicial power of individual States into collision with the military forces of the Union.

In all such cases, it was essential to preserve the power and dignity of the General Government unimpaired, and at the same time to avoid open rupture with the courts; hence it was desirable to meet and foil the secret enemies of their country by the use of *judicial* weapons. The stern demands of military necessity were to be reconciled with the maintenance of civil liberty, and with the preservation of local self-government. It became necessary to show that when, in time of war, the life of the body politic was in danger, the surgeon's knife was the only instrument by which that life could be saved.

The judicial mind was then far from comprehending either the perilous condition of public affairs, the change wrought by civil war in the rights, powers, and duties of the bench, or the danger of destroying the government itself by collision between its Political and Judicial Departments. The powers of war, the rights of war, and the courts of war, seemed equally strange and alarming; and it is a gratifying proof of the learning and wisdom of the bench, of the bar, and of Congress, that recognition and sanction of doctrines of constitutional law,

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which two years ago were confined to a few individuals, have now become so general among our most eminent judges, lawyers, and legislators.

The following pages on Military Arrests were written in the winter and spring of 1862–3, in order to express, in a form convenient for transmission to counsel acting under his instructions, the views of the author on the general legal principles on which military arrests are justifiable and defensible. They contain in more extended form the same doctrines of constitutional law expressed in the WAR POWERS, page 83; and were originally published and distributed by order of the Secretary of War.

W. W.

WAR DEPARTMENT,
WASHINGTON, June 30, 1864.

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MILITARY ARRESTS.

THE people of the United States, having made great sacrifices to secure and perpetuate the blessings of civil liberty, demand, in time of peace, protection and security in the enjoyment of all rights guaranteed to them by the Constitution. But civil war has compelled the government to use its war powers of seizing property and of capturing persons by military authority. Such seizures and captures have been regarded as a wrongful use of arbitrary power, and have, therefore, been looked upon with alarm. For this reason loyal citizens have, in some instances, made the mistake of setting up unjustifiable claims in behalf of public enemies, asserting for them the privilege of freedom from military arrest, or of discharge from imprisonment, and have thus, unintentionally, aided the rebellion by striving to prevent our military forces from temporarily restraining persons acting in open hostility against them. A careful examination of the powers and duties of the government will show that arrests of persons and seizures of property may be made by military authority, in time of rebellion, without destroying our liberty or violating the Constitution; and that we need not overstate the claims of traitors in order to secure the rights of citizens.

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CIVIL WAR CHANGES OUR LIBERTIES.

In time of civil war every citizen must needs be curtailed of some of his accustomed privileges. Soldiers and sailors give up much of their personal liberty by rendering themselves liable to obey the orders of their commanding officers. All subjects of our government capable of bearing arms may be enrolled in the forces of the United States, and are liable to be made soldiers. Our property is liable to be diminished by unusual taxes, or wholly appropriated to public use, or destroyed on the approach of an enemy. Trade and commercial intercourse with our adversaries are no longer lawful. Civil, municipal, constitutional and international rights are all affected by the existence of civil war. Shall those who are disloyal or hostile to the Union complain that their privileges are also modified in order to protect the country from their own misconduct?

Some reference to the *general* war powers of the President being essential to an explanation of the subject of *military arrests*, it has been found most convenient to repeat, in this connection, the following extracts, which may be found in a preceding chapter.*

GENERAL WAR POWERS OF THE PRESIDENT.

"It is not intended (in this chapter) to explain the general war powers of the President. They are principally contained in the Constitution, Art. II., Sect. 1, Cl. 1 and 7; Sect. 2, Cl. 1; Sect. 3, Cl. 1; and in Sect. 1, Cl. 1, and by necessary implication in Art. I., Sect. 9

* Chapter III., "War Powers," pp. 82, 83.

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Cl. 2. By Art. II., Sect. 2, the President is made commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the service of the United States. This clause gives ample powers of war to the President, when the army and navy are lawfully in 'actual service.' His military authority is supreme, under the Constitution, while governing and regulating the land and naval forces, and treating captures on land and water in accordance with such rules as Congress may have passed in pursuance of Art. I., Sect. 8, Cl. 11, 14. Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements, and measures essential to overcome the enemy — for the general conduct of the war — the President is responsible to and controlled by no other department of government. His duty is to uphold the Constitution and enforce the laws, and to respect whatever rights loyal citizens are entitled to enjoy in time of civil war, to the fullest extent that may be consistent with the performance of the military duty imposed on him.*

"What is the extent of the military power of the President over the persons and property of citizens at a distance from the seat of war — whether he or the War Department may lawfully order the arrest of citizens in loyal States on reasonable proof that they are either enemies or aiding the enemy; or that they are spies or emissaries of rebels sent to gain information for their use, or to discourage enlistments; whether

* The effect of a state of war, in changing or modifying civil rights, is explained in the "War Powers of the President," &c. See "Civil Rights."

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martial law may be extended over such places as the commander deems it necessary to guard, even though distant from any battle-field, in order to enable him to prosecute the war effectually; whether the writ of *habeas corpus* may be suspended, as to persons under military arrest, by the President, or only by Congress (on which point judges of the United States courts disagree); whether, in time of war, all citizens are liable to military arrest, on reasonable proof of their aiding or abetting the enemy, or whether they are entitled to practise treason until indicted by some grand jury (thus, for example, whether Jefferson Davis, or General Lee, if found in Boston, could be arrested by military authority and sent to Fort Warren); whether, in the midst of wide-spread and terrific war, those persons who violate the laws of war and the laws of peace, traitors, spies, emissaries, brigands, bush-whackers, guerrillas, persons in the free States supplying arms and ammunition to the enemy, must all be proceeded against by civil tribunals only, under due forms and precedents of law, by the tardy and ineffectual machinery of arrests by marshals, who can rarely have means of apprehending them, and of grand juries, who meet twice a year, and could seldom, if ever, seasonably secure the evidence on which to indict them; whether government is not entitled by military power to PREVENT the traitors and spies, by arrest and imprisonment, from doing the intended mischief, as well as to punish them after it is done; whether war can be carried on successfully, without the power to save the army and navy from being betrayed and destroyed by depriving any citizen temporarily of the power of acting as an enemy, when-

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ever there is reasonable cause to suspect him of being one; whether these and similar proceedings are, or are not, in violation of any civil rights of citizens under the Constitution, are questions to which the answers depend on the construction given to the war powers of the Executive. Whatever any commander-in-chief, in accordance with the usual practice of carrying on war among civilized nations, may order his army and navy to do, is within the *power* of the President to order and to execute, because the Constitution, in express terms, gives him the supreme command of both. If he makes war upon a foreign nation, he should be governed by the law of nations; if lawfully engaged in civil war, he may treat his enemies as subjects and as belligerents.

"The Constitution provides that the government and regulation of the land and naval forces, and the treatment of captures, should be according to law; but it imposes, in express terms, no other qualification of the war power of the President. It does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted; nor to which the picket guards or military officers (sometimes called *provost marshals*) shall be confined. It does not exempt any person making war upon the country or aiding and comforting the enemy, from being captured, or arrested, wherever he may be found, whether within or beyond the lines of any division of the army. It does not provide that public enemies, or their abettors, shall find safe asylum in any part of the United States where military power can reach them. It requires the President, as an executive magistrate, in time of peace, to see that the laws existing in time of peace are faithfully

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executed; and as commander-in-chief, in time of war, to see that the laws of war are executed. In doing both duties he is strictly obeying the Constitution."

MARTIAL LAW IS THE LAW OF WAR.

It consists of a code of rules and principles regulating the rights, liabilities, and duties, the social, municipal, and international relations, in time of war, of all persons, whether neutral or belligerent. These rules are liable to modification in the United States by statutes usually termed "military law," or "articles of war," and by the "rules and regulations made in pursuance thereof."

FOUNDATION OF MARTIAL LAW.

Municipal law is founded upon the necessities of social organization. Martial law is founded upon the necessities of war. Whatever compels a resort to war, compels the enforcement of the laws of war.

THE LAWFUL MEANS OF WAR AS SHOWN BY THE OBJECTS AND NECESSITIES OF WAR.

The objects and purposes for which war is inaugurated require the use of the instrumentalities of war. When the law of force is appealed to, force must be sufficiently untrammelled to be *effectual.* Military power must not be restrained from reaching the public enemy in all localities, under all disguises. In war there should be no asylum for treason. The ægis of law should not cover a traitor. A public enemy, wherever found in arms, may, if he resists, be killed, or captured, and if captured he may be detained as a

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prisoner. The purposes for which war is carried on may and must be accomplished. If it is justifiable to commence and continue war, then it is justifiable to extend the operations of war until they shall have completely attained the end for which it was commenced, by the use of all means employed in accordance with the rules of civilized warfare. And among those means none are more familiar or more essential than that of capturing, or arresting and confining the enemy. Necessity arbitrates the rights and the methods of war. Whatever hostile military act is essential to public safety in civil war is lawful.

POWERS AND RESPONSIBILITIES OF MILITARY COMMANDERS.

"The law of nature and of nations gives to belligerents the right to employ such force as may be necessary in order to obtain the object for which the war was undertaken." Beyond this the use of force is unlawful. This necessity forms the limit of hostile operations.

We have the same rights of war against the allies or associates of an enemy as against the principal belligerent.

When military forces are called into service for the purpose of securing the public safety, they may lawfully obey military orders made by their superior officers. The commander-in-chief is responsible for the mode of carrying on war. He determines the persons or people against whom his forces shall be used. He alone is constituted the judge of the nature of the exigency, of the appropriate means to meet it, and of the hostile character or purposes of individuals whose conduct gives him cause to believe them to be enemies.

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His right to seize, capture, detain and imprison such persons is as unquestionable as his right to carry on war. The extent of the danger he is to provide against must be determined by him; he is responsible, if he neglects to use the means of meeting or avoiding it.

The nature of the difficulty to be met and the object to be accomplished afford the true measure and limit of the use of military powers. The military commander must judge *who* the public enemy are, where they are, what degree of force shall be used against them, and what warlike measures are best suited to conquer or effectually restrain them from future mischief. If the enemy be in small force, they may be captured by another small force; if the enemy be a single individual, he may be captured by a provost guard or marshal. If an officer, in the honest exercise of his duty, makes a mistake in arresting a friend instead of an enemy, or in detaining a suspicious person, who may be finally liberated, he is not responsible for such error in criminal or civil courts.

Any other rule would render war impracticable, and, by exposing soldiers to the hazard of ruinous litigation if held liable to civil tribunals, would render obedience to orders dangerous, and thus would break down the discipline of armies.

ARRESTS ON SUSPICION.

Arrests or captures of persons whose conduct gives reasonable cause to suspect that they contemplate acts of hostility, are required and justified by military and martial law. Such arrests are precautionary. The

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detention of such suspected persons by military authority is, for the same reason, necessary and justifiable.*

Nothing in the Constitution or laws can define the possible extent of any military danger. Nothing therefore in either of them can fix or define the extent of power necessary to meet the emergency, to control the military movements of the army, or of any detachments from it, or of any single officer, provost marshal, or private.

Hence it is worse than idle to attempt to lay down rules of law defining the territorial limits of military operations, or of martial law, or of captures and arrests.

Wherever danger arises, there should go the military means of defence or safeguard against it. Wherever a single enemy makes his appearance, there he should be arrested and restrained.

ABUSE OF POWER OF ARREST.

The power of arrest and imprisonment is doubtless liable to abuse. But the liability to abuse does not prove that the power does not exist. "There is no power," says the Supreme Court, "that is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry

* *Luther* v. *Borden*, 7 Howard's Supreme Court Reports, p. 1.

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with them all the checks which can be useful to guard against usurpation or wanton tyranny." *

SAFEGUARDS.

Our safeguards against the abuse of military power are found, not in the denial of its existence, not in depriving ourselves of its protection in time of public danger, but in the civil responsibility of officers for acts not justified by martial law, in the right to impeach the President if he wilfully fails to execute the laws, in the frequent change of public officers, in the intelligence and high character of our soldiers, and in the legislative power of Congress, which alone can declare war, raise and support armies, make laws for their government while in actual service, and may withhold supplies, and may regulate or prevent the use of the army and the navy where and when they might endanger the public safety.

EFFECT OF WAR UPON THE COURTS AND OF COURTS UPON THE WAR.

Justice should rule over the deadly encounters of the battle-field; but courts and constables are there quite out of place. Far from the centres of active hostilities, judicial tribunals may still administer municipal law, so long as their proceedings do not interfere with military operations. But if the members of a court should impede, oppose, or interfere with military operations in the field, whether acting as magistrates or as individuals, they, like all other public enemies, are liable to capture and imprisonment by martial law. They have then lost the right to hold office, and have become ac-

* 12 Wheaton's Reports, p. 32.

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tively hostile. The character of their actions is to be determined by the military commander, not by the parchment which contains their commissions. A judge may be a public enemy as effectually as any other citizen. The rebellious districts show many examples of such characters. Is a judge sitting in a northern court, and endeavoring to commit acts of hostility under the guise of administering law, any less a public enemy than if he were holding court in South Carolina, and pretending to confiscate the property of loyal men? Are the black gown and wig to be the protection of traitors?

General Jackson arrested a judge in the war of 1812, kept him in prison in order to prevent his acts of judicial hostility, and liberated him when he had repulsed the enemy. The illegal fine imposed on him by that judge was repaid to the General after many years, under a vote of Congress. Why should a judge be protected from the consequences of his acts of hostility more than the clergyman, the lawyer, or the governor of a State?

The public safety must not be hazarded by enemies, whatever position they may hold in public or private life. The more eminent their position, the more dangerous their disloyalty. Among acts of hostility which would show a judge to be a public enemy, and would subject him to arrest, are these: —

1. When a State judge is judicially apprised that a party is in custody under the authority of the United States, he cannot lawfully proceed, under a *habeas corpus* or other process, to discharge the prisoner.

If he orders the prisoner to be discharged, it is the duty of the officer holding the prisoner to resist that

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order, and the laws of the United States will sustain him in doing so, and in arresting and imprisoning the judge, if necessary.*

2. So long as the courts do not interfere with military operations ordered by the commander-in-chief, litigation may proceed as usual; but if that litigation entangles and harasses the soldiers or the officers so as to disable them from doing their military duty, the judges and the actors being hostile, and using legal processes for the purpose and design of impeding and obstructing the necessary military operations in time of war, the courts and lawyers are liable to precautionary arrest and confinement, whether they have committed a crime known to the statute law or not. Military restraint is to be used for the prevention of hostilities, and public safety in time of civil war will not permit courts or constables, colleges or slave-pens, to be used as instruments of hostility to the country.

When a traitor is seized in the act of committing hostility against the country, it makes no difference whether he is captured in a swamp or in a court-house, or whether he has in his pocket the commission of a judge or a colonel.

Commanders in the field are under no obligations to take the opinions of judges as to the character or extent of their military operations, nor as to the question who are and who are not public enemies, nor who have and who have not given reasonable cause to believe that acts of hostility are intended. These questions are, by the paramount laws of war, to be settled by the officer in command.

* *Ableman* v. *Booth*, 21 How. 524, 525.

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MILITARY ARRESTS ARE NOT FORBIDDEN BY THE CONSTITUTION.

The framers of the Constitution having given to the commander-in-chief the full control of the army when in active service, subject only to the articles of war, have therefore given him the full powers of capture and arrest of enemies, and have placed upon him the corresponding obligation to use any and all such powers as may be proper to insure the success of our arms. To carry on war without the power of capturing or arresting enemies would be impossible. We should not, therefore, expect to find in the Constitution a provision which would deprive the country of any means of self-defence in time of unusual public danger.

We look in vain in the Constitution for a clause which in any way limits the methods of using war powers when war exists.

Some persons have turned attention to certain passages in the amendments relating, as was supposed, to this subject. Let us examine them : —

ARTICLE IV. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."

This amendment merely declares that the right of being secure against *unreasonable* seizures or arrests shall not be violated. It does not declare that no arrests shall be made. Will any one deny that it is *reasonable* to arrest or capture the person of a public enemy ?

If all arrests, reasonable or unreasonable, were prohibited, public safety would be disregarded in favor of the rights of individuals.

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Not only may military, but even civil arrests be made when reasonable.

ARRESTS WITHOUT WARRANT.

It is objected that military arrests are made without warrant. The military order is the warrant authorizing arrest, issuing from a commander, in like manner as the judicial order is the warrant authorizing arrest, issuing from a court. But even civil arrests at common law may be made without warrant by constables, or by private persons (1 Chitty, C. L., 15 to 22). There is a liability to fine and imprisonment if an offender is voluntarily permitted to escape by a person present at the commission of a felony or the infliction of a dangerous wound.

Whenever there is probable ground of suspicion that a felony has been committed, a private person may without warrant arrest the felon, and probable cause will protect the captor from civil liability.

"When a felony has been committed, a constable may arrest a supposed offender on information, without a positive charge, and without a positive knowledge of the circumstances." And Chitty says, page 217, "A constable may justify an imprisonment, without warrant, on a reasonable charge of felony made to him, although he afterwards discharge the prisoner without taking him before a magistrate, although it turns out that no felony was committed by any one."

In Wakely *v.* Hart, 6 Binney, 318, Chief Justice Tilghman says of the constitution of Pennsylvania, which is nearly in the same words on this subject as the Constitution of the United States, —

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"The plaintiffs insist that by the constitution of this State no arrest is lawful without warrant issued on probable cause, supported by oath. Whether this be the true construction of the Constitution is the main point in the case. It is declared in the 9th article, section 7, 'that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable arrests, and that no warrant to search any place, or seize any person or thing, shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.'

"The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, and in so general and vague a form as may put it in the power of officers who execute them to harass innocent persons under pretence of suspicion; for, if general warrants were allowed, it must be left to the discretion of the officer on what persons or things they are to be executed. But *it is nowhere said* that there shall be *no arrest without warrant.* To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot, or suffered to escape. So, although if not seen, yet if known to have committed a felony, and pursued with or without warrant, he may be arrested by any person.

"And even where there is only probable cause of suspicion, a *private person* may, without warrant, at his peril, make the arrest. I say at his peril, for nothing short of proving the felony will justify the arrest" (that is, by a private person on suspicion). "These principles of common law are essential to the welfare of society, and not intended to be altered or impaired by the Constitution."

The right summarily to arrest persons in the act of committing heinous crimes, has thus been sanctioned from ancient times by the laws of England and America. No warrant is required to justify arrests of persons committing felonies. The right to make such arrests is essential to the preservation of the existence of society, though its exercise ought to be carefully guarded. The great problem is to reconcile the neces-

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sities of government with the security of personal liberty.

If, in time of peace, civil arrests for felonies may be made by private citizens without warrant, *a fortiori*, military arrests in time of war, for acts of hostility, either executed or contemplated, may be made under the warrant of a military command. And the provision that *unreasonable* seizures or arrests are prohibited has no application to military arrests in time of war.

OBJECTION THAT ARRESTS ARE MADE WITHOUT INDICTMENT.

The 5th article of the amendments of the Constitution provides that —

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

This article has no reference to the rights of citizens under the exigencies of war, but relates only to their rights in time of peace. It is provided that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. If rebellion or treason be one of the offences here alluded to, and a rebel has been once under fire, and thus been put in jeopardy of life or limb (in one sense of that phrase), he could not be fired at a second time without violating the Constitution, because a second shot would put him twice in jeopardy for the same offence.

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"Nor shall he be deprived of life, liberty, or property without due process of law." If this provision relates to the rights of citizens *in time of war*, it is obvious that no property can be captured, no rebel killed in battle, or imprisoned, by martial law.

The claim that "no person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury, except in cases," &c., in like manner applies only to the rights of citizens in time of peace.

What are "cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger"?

Suppose the Union forces arrest a spy from the enemy's camp, or catch a band of guerrillas; neither the spy nor the guerrillas belong to our land or naval forces. The enemy are no part of our army or of our militia; and while this provision covers offences therein specified, if committed by our troops, and allows them to be dealt with by martial law, it would (if it is applicable in time of war) prevent our executing martial law against such enemies captured in war. We should, under such a construction, be required to indict and prosecute our enemy for capital crimes, instead of capturing and treating them as prisoners of war, or punishing them according to the laws of war. The absurdity of such a construction is obvious. The language cited is inapplicable to a case of military arrest in war time.

Captured soldiers are not ordinarily held as malefactors, but are treated as prisoners of war, to be detained, released, exchanged, or paroled. They are not expected to plead to any indictment or other civil pro-

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cess. They are not held in custody to answer before any judicial tribunal for any crime, infamous or otherwise. They are treated in strict accordance with the laws of war. Hence that clause in the Constitution which provides for trial by jury, the right to be informed of the nature and cause of the accusation, &c., relates in express terms only to criminal prosecutions in civil courts, and has nothing to do with military arrests or the procedures of martial law. Therefore it is obvious that, while criminal proceedings against persons not in the naval or military service are guarded in time of peace, and the outposts of justice are secured by freedom from unreasonable arrests, by requiring indictments to be found by grand jurors, by speedy and public trial before impartial juries, by information of the nature of the charges, open examination of witnesses, aid of counsel, &c., these high privileges are not accorded to our public enemy in time of war, nor to those citizens who commit military offences, which, not being against any statute or municipal law, cannot be the foundation of any indictment, punishment, or trial by jury, and do not constitute any capital or otherwise infamous crime, nor to persons who commit acts which impede, embarrass, and tend to thwart the military measures of the government.

The safeguards of criminal procedures in courts of justice in time of peace are not to be construed into protection of public enemies in time of war.

THE CONSTITUTION SANCTIONS MILITARY ARRESTS.

The Constitution itself authorizes courts martial. These courts punish for offences different from those provided for by any criminal statute. Therefore it fol-

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lows that crimes not against statute laws may be punished by law according to the Constitution, and also that arrests necessary to bring the offenders before that tribunal are lawful.

In *Dynes* v. *Hoover*,* the evidence was, that an attempt had been made to hold a marshal liable for executing the order of the President of the United States in committing Dynes to the penitentiary for an offence of which he had been adjudged guilty by a naval court martial.

This case shows that the crimes to be punished, and the modes of procedure by courts martial are different from those of ordinary civil tribunals; that the jurisdiction of these classes of tribunals is distinct, and that the judicial power, and the military power of courts martial, both authorized by the same Constitution, are independent of each other, and that courts martial may punish offences other than those provided for by criminal statutes. Therefore it follows that military arrests may be lawfully made of those who are guilty of such offences. The law is thus laid down by the Supreme Court: —

"The demurrer admits that the court martial was legally organized, and the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of not guilty; and that, upon the evidence in the case, the court found Dynes guilty of an attempt to desert, and sentenced him to be punished, as has been already stated; that the sentence of the court was approved by the Secretary, and by his direction Dynes was

* 20 Howard's Supreme Court Reports, p. 65.

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brought to Washington; and that the defendant was marshal for the District of Columbia, and that in receiving Dynes and committing him to the keeper of the penitentiary, he obeyed the orders of the President of the United States in execution of the sentence. Among the powers conferred upon Congress by the 8th section of the 1st article of the Constitution are the following: 'To provide and maintain a navy;' 'to make rules for the government of the land and naval forces.' And the eighth amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the 2d section of the 2d article of the Constitution, it is declared that 'the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States.'

"These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations, and that the power to do so is given without any connection between it and the 3d article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

The fact that the power exists of suspending the writ of *habeas corpus* in time of rebellion, when the public safety requires it, shows that the framers of the Constitution expected that arrests would be made for crimes not against municipal law, and that the administration of the ordinary rules of law on *habeas corpus* would require discharge of prisoners, and that such dis-

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charge might endanger public safety. It was to protect public safety in time of rebellion that the right to suspend the *habeas corpus* was left in the power of government.

MILITARY POWERS MAY BE DELEGATED.

In the course of the preceding remarks the commander-in-chief has been the only military authority spoken of as authorized to order arrests and seizures. His powers may be delegated to officers, and may be used by them under his command. So also the Secretaries of War and State are public officers, through whom the President acts in making orders for arrests, and their acts are in law the acts of the President. It is necessary to the proper conduct of war that many if not most of the powers of the President as commander should be delegated to his secretaries and his generals, and that many of their powers should be exercised by officers under them; and although it not seldom happens that subalterns abuse the power of arrest and detention, yet the inconvenience resulting from this fact is one of the inevitable misfortunes of war.

OBEDIENCE OF ORDERS IS JUSTIFICATION.

Whatever military man obeys the order of his superior officer is justified by law in doing so. Obedience to orders is a part of the law of the land; a violation of that law subjects the soldier to disgraceful punishment. Acts done in obedience to military orders will not subject the agent to civil or criminal liability in courts of law.* But, on the other hand, any abuse of

* Since the third edition of this essay was in print, Congress passed the act of March 3, 1863, which fully carries out this principle, and since the forty-second edition was in print, also passed the act of May 11, 1866, and the act of 1868 (chap. 276), covering all cases which occurred during the war.

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military authority subjects the offender to civil liability for such abuse, and he who authorized the wrong is responsible for it.

OFFICERS MAKING ARRESTS NOT LIABLE TO CIVIL SUIT OR CRIMINAL PROSECUTION.

That military arrests are deemed necessary for public safety by Congress is shown by the act of March 3, 1863, ch. 81, wherein it is provided that no person arrested by authority of the President of the United States shall be discharged from imprisonment so long as the war lasts, and the President shall see fit to suspend the privilege of the writ of *habeas corpus.*

The 4th section of the same act provides "that any order of the President, or under his authority, made at any time during the existence of this present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress; and such defence may be made by special plea, or under the general issue."

The same act further provides that actions against officers and others in tort for arrests commenced in State Courts may be removed to Circuit Courts, and thence to the Supreme Court. The jurisdiction of State courts thereupon ceases, and the rights of the defendant may be protected by the laws of the United States, administered by the Supreme Court, thus securing immunity for the past and protection for the future performance of military and civil duties under orders of the President in time of war. The provisions

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of this act contain an implied admission of the necessity to public welfare of arrests for crimes not against statutes, but endangering public safety, and of imprisonments for offences not known to the municipal laws, but yet equally dangerous to the country in civil war.

ARBITRARY POWER NOT CONSISTENT WITH FREE OR CONSTITUTIONAL GOVERNMENTS.

The exercise of irresponsible powers is incompatible with constitutional government. Unbridled will, the offspring of selfishness and of arrogance, regards no rights, and listens to no claims of reason, justice, policy, or honor. Its imperious mandate being its only law, arbitrary power sucks out the heart's blood of civil liberty. Vindicated by our fathers on many a hard-fought battle-field, and made holy by the sacrifice of their noblest sons, that liberty must not be wounded or destroyed; and in time of peace, in a free country, its power should shelter loyal citizens from arbitrary arrests and unreasonable seizures of their persons or property.

TRUE MEANING OF "ARBITRARY" AS DISTINGUISHED FROM "DISCRETIONARY."

Among the acts of war which have been severely censured, is that class of military captures reproachfully styled arbitrary arrests. What is the true meaning of the word "arbitrary"? When used to characterize military arrests, it means such as are made at the mere will and pleasure of the officer, without right and without lawful authority. But powers are not arbitrary because they may be discretionary. The authority of judges is often discretionary. Although

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judicial discretion is governed by rules, made by the judges themselves, yet no one can justly claim that such authority is arbitrary. The existence of an authority may be undeniable, while the mode of using it may be discretionary. A power is arbitrary only when it is founded upon no rightful authority, civil or military. It may be within the discretion of a commander to make a military order, to dictate its terms, to act upon facts and reasons known only to himself; it may suddenly and violently affect the property, liberty, or life of soldiers or of citizens; yet such an order, being the lawful use of a discretionary authority, is not the exercise of arbitrary power. When such orders are issued on the field, or in the midst of active operations, no objection is made to them on the pretence that they are lawless or unauthorized, nor for the reason that they must be instantly and absolutely obeyed. The difference is plain between the exercise of arbitrary power, and the arbitrary exercise of power. The former is against law; the latter, however ungraciously or inconsiderately applied, is lawful.

MILITARY ARRESTS LAWFUL.

The laws of war, military and martial, written and unwritten, are founded on the necessities of government, and sanctioned by the Constitution, and have been recognized as valid in several acts of Congress, and by the Supreme Court of the United States. Arrests made under the laws of war are neither arbitrary nor without legal justification. In *Cross* v. *Harrison*, Judge Wayne, delivering the opinion of the Court,* says, —

* 16 Howard, 189, 190.

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"Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commanders of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government and of the army, which had the conquest in possession. No one can doubt that these orders of the President and the action of our army and navy commanders in California, in conformity with them, were according to the law of arms," &c.

So, in *Fleming* v. *Paige*,* Chief Justice Taney says, —

"The person who acted in the character of collector in this instance, acted as such under the authority of the military commander and in obedience to his orders; and the regulations he adopted were not those prescribed by law, but by the President in his character as commander-in-chief."

It is established by these opinions that military orders in accordance with martial law or the laws of war, though they may be contrary to municipal laws, and the use of the usual means of enforcing such orders by military power, including capture, arrest, imprisonment, or the destruction of life and property, are authorized and sustained upon the firm basis of martial law, which is, in time of war, constitutional law. A military arrest, being one of the recognized necessities of warfare, is as legal and constitutional a procedure, under the laws of war, as an arrest by civil authority, by the sheriff, after the criminal has been indicted by a grand jury for a statute offence. In time of peace, the interference of military force is offensive to a free people. Its decrees seem overbear-

* 9 Howard, 615.

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ing, and its procedures violent. It has few safeguards and no restraints. The genius of republican government revolts against permanent military rule. Hence the suspicions of the people are easily aroused upon any appearance of usurpation. It is for this reason that some opponents of the government have endeavored to cripple the war power of the President, by exciting a natural but unfounded apprehension that military arrests, a familiar weapon of warfare, can be employed only at the hazard of civil liberty.

ON WHAT GROUND FORCE IS JUSTIFIABLE.

When the administration of laws is resisted by an armed public enemy; when government is assaulted or overthrown; when magistrate and ruler are alike powerless, the nation must assert and maintain its rights by force of arms. Government must fight or perish. Self-preservation requires the nation to defend its rights by military power. The right to use military power rests on the universal law of self-defence.

MARTIAL LAW.

When war is waged, it ought not to degenerate into unbridled brutality, but it should conform to the dictates of justice and of humanity. Its objects, means, and methods should be justifiable in the forum of civilized and Christian nations. The laws or rules which usually govern this use of force are called military and martial law, or the laws of war.

Principles deducible from a consideration of the nature, objects, and means of war will, if understood, remove from the mind the apprehension of danger to civil liberty from military arrests and other employment of

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force. When war exists, whatever is done in accordance with the laws of war is not arbitrary, and is not in derogation of the civil rights of citizens, but is *lawful*, justifiable, and indispensable to public safety.

WAR POWER HAS LIMITS.

Although the empire of the war power is vast, yet it has definite boundaries, wherein it is supreme. It overrides municipal laws and all domestic institutions or relations which impede or interfere with its complete sway. It reigns uncontrollable until its legitimate work is executed; but then it lays down its dripping sword at the feet of Justice, whose wrongs it has avenged.

It is not now proposed to define the limits and restrictions imposed by the laws of warfare upon the general proceedings of belligerents. It is to one only of the usual methods of war that attention is now directed, namely, to the capture and detention of public enemies.

ARRESTS NECESSARY.

Effectual hostilities could not be prosecuted without exercising the right to capture and imprison hostile persons. Barbarous nations only, would justify the killing of those who might fall into their power. It is now too late to question the authority of martial law, which sanctions the arrest and detention of those who engage in foreign or civil war. The imprisonment of such persons is much more important to the public safety in civil, than in international, warfare.

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MILITARY CRIMES.

Military crimes, or crimes of war, include all acts of hostility to the country, to the government, or to any department or officer thereof; to the army or navy, or to any person employed therein: *provided* that such acts of hostility have the effect of opposing, embarrassing, defeating, or even of interfering with, our military or naval operations in carrying on the war, or of aiding, encouraging, or supporting the enemy.

According to the laws of war, military arrests may be made for the punishment or prevention of military crimes.

DOUBLE LIABILITY.

Such crimes may or may not be offences against statutes. The fact that an act of hostility is against municipal as well as martial law, even though it may subject the offender to indictment in civil tribunals, does not relieve him from responsibility to military power. To make civil war against the United States is to commit treason. Such act of treason renders the traitor liable to indictment and condemnation in the courts, and to capture, arrest, or death on the field of battle. But because a traitor may be hung as a criminal by the sheriff, it does not follow that he may not be captured, arrested, or shot as a public enemy by the soldiers. An act of hostility may thus subject the offender to twofold liability; first to civil, and then to military tribunals. Whoever denies the right to make military arrests for crimes which are punishable by civil tribunals, would necessarily withhold one of the usual and

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most effective and essential means of carrying on war. Whoever restricts that right to cases where crimes have been committed in violation of some special statute, would destroy one of the chief safeguards of public security and defence.

ACTS MADE CRIMINAL BY A STATE OF WAR.

The quality of an act depends on the time, place, and circumstances under which it is performed. Acts which would have been harmless and innocent in time of peace, become dangerous, injurious, and guilty in time of war. The rules and regulations of the military service contain many illustrations of this fact. For a soldier to speak contemptuously of a superior officer, might, as between two civilians, be a harmless or beneficial use of "free speech;" but as in time of war such "free speech" might destroy discipline, encourage disobedience of orders, or even break up the confidence of the soldiers in their commanders, such speaking is strictly forbidden, and becomes a crime. Many rules and regulations of our army and navy are such that disregard of them in time of peace would be attended by no important consequences; yet a breach of them, in time of war, might become an offence against martial law, such as would lead to disastrous results. In like manner, a citizen may commit acts to which he is accustomed in ordinary times, but which become the gravest crimes in time of war, although not embraced in the civil penal code. Actions not constituting any offence against the municipal code of a country, having become highly injurious and embarrassing to military operations, may, and must, be prevented, if not punished. Such actions, being crimes

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against military or martial law, or the laws of war, can be repressed only by capture and confinement of the offender. If an act which interferes with military operations is not against municipal law, the greater is the reason for resisting it by martial law. And if such an act cannot be punished or prevented by civil or criminal law, this fact makes stronger the necessity of avoiding its evil consequences, by arresting the offender. Absence of penal law imperatively demands the application of military preventive process, namely, the capture of public enemies.

ARREST OF INNOCENT PERSONS.

Innocent persons are, under certain circumstances, liable to military arrest in time of civil war. Suppose an army retreating from an unsuccessful battle, and desirous of concealing from the enemy its numbers, its position, and the direction taken by its forces; if, in order to prevent these facts from becoming known to their pursuers, the persons who are met on the retreat are captured and carried away, can any one doubt the right of making such arrests? However loyal or friendly those persons may be, yet, if seized by a pursuing enemy, they might be compelled to disclose facts by which the retreating army could be destroyed. Hence, when war exists, and the arrest and detention of even innocent persons are essential to the success of military operations, such arrest and detention are lawful and justifiable. Suppose a loyal judge holding a court in a loyal State, and a witness on the stand, who knows the details of a proposed military expedition which it would be highly

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injurious to the military operations of the army or navy to have disclosed or made public; would any one doubt the right of the military commander to *stop the trial* on the instant, and, if necessary, to imprison the judge or the witness, to prevent the knowledge of our military plans and expeditions from being communicated to the enemy? The innocence of the person who may, through ignorance, weakness, or folly, endanger the success of military operations, does not deprive the commander in the field, of the power to guard against hazard and prevent mischief. The true principle is this: a military officer has the power, in time of war, to arrest and detain all persons within the field of his command, who, he has reasonable cause to believe, will, by being at large, impede or endanger the military operations, for the conduct of which he is responsible. The true test of liability to arrest is, therefore, not alone the guilt or innocence of the party; not alone his nearness to or distance from the places where battles are impending; not alone whether he is engaged in active hostilities, but whether his being at large will actually tend to impede, embarrass, or hinder our lawful military operations in creating, organizing, maintaining, and most effectually using the military forces of the country. Arrests may be made by reason of *bona fide* military necessity, or to punish or prevent military crimes; no arrests, made under pretence of the war power, for other objects, are lawful or justifiable. The dividing line between civil liberty and military power is precisely here: civil liberty secures the right to freedom from arrests, except by civil process in time of peace, or by military power when war exists, and when the exigencies of the case are such that the

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arrest is required in order to prevent embarrassment or injury to the *bona fide* military operations of the army or navy. It is not enough to authorize arrests to say that *war exists*, or that it is a *time* of war, unless martial law is declared. Nor is it necessary, to justify them, that active hostilities should be going on at the *place* of the capture. It is, however, enough to justify an arrest in any place, however far removed from the battle-fields of contending armies, that it is a time of war, and that the arrest is required by a lawful military court, to punish a military crime, or is necessary to *prevent* an act of hostility, or even to avoid the danger that military operations of any description may be impeded, embarrassed, or prevented. In considering this right of capturing our enemies, it must be borne in mind that "a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually *a prisoner of war*. No matter what his alleged offence, whether he is a rebel, a traitor, a spy, or an enemy in arms; he is to be held and punished according to *the laws of war*, for these have been substituted for the laws of peace."

CAUSES OF ARREST CANNOT BE SAFELY DISCLOSED.

It cannot be expected, when government finds it necessary to make arrests for causes which exist during civil war, that the reasons for making such arrests should be at once made public; otherwise the purpose for which an arrest is made might be defeated. Thus, if a conspiracy has been formed to commit hostilities, and one conspirator is arrested, publishing the facts might enable other conspirators, taking advantage of their information, to escape. It may be necessary to

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make arrests on grounds justifying suspicion of hostile intentions, when it might be an act of injustice to the party suspected, if innocent, to publish the facts on which such suspicions were entertained; and if guilty, it might disable the government from obtaining proof against him, or from preventing the hostile act. Under these circumstances the safety of civil liberty must rest in the honesty, integrity, and responsibility of those who have been for the time clothed with the high powers of administering the government.

ARRESTS TO PREVENT HOSTILITIES.

The best use of armies and of navies is not to punish criminals for offences against laws, but to prevent public enemies from committing future hostilities. Victory and conquest are not for revenge of wrongs, but for security of rights. Arch traitors and consummate villains are not those on whom the avenging sword is most apt to fall, but the dupes and victims of their crimes oftenest bear the sharp catastrophe of battles. We arrest and hold an enemy, not to punish, but to restrain him from acts of hostility; we hang a spy not only to deter others from committing a similar offence, but chiefly to prevent his betraying us to the enemy. We capture and destroy the property even of friends, if exposed in an enemy's country, not to injure those who wish us well, but to withdraw their property from liability to be used by our opponents. In a defensive civil war, many, if not most military operations have for their legitimate object the prevention of acts of hostility. In case of foreign war, an act of Congress provides that to prevent hostilities by aliens, they may be arrested. In case of —

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"declared war between the United States and any foreign nation, or of any invasion or predatory incursion being *attempted* or *threatened* against any territory of the United States by any foreign government, if the President shall make public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, shall be liable to be *apprehended, restrained, secured, and removed as alien enemies.*"

"Power over this subject is given to the President, having due regard to treaty stipulations, by the act of the 6th of July, 1798; and by this act the President was authorized to direct the *confinement* of *aliens*, although such confinement was not for the purpose of removing them from the United States, and means were conferred on him to enforce his orders, and it was not necessary that any judicial means should be called in to enforce the regulations of the President." *

Thus express power is given by statute to the President to make military arrests of innocent foreign-born persons, under the circumstances above stated, for the purpose of preventing them from taking part in the contest. While this ample authority is given to the commander-in-chief to arrest the persons of aliens residing here, as a precautionary measure, a far greater power over the persons of our own citizens is, for the same reason, given to the President in case of *public danger*. The law of Congress (1795) provides that the army may be called into actual service not only in cases of foreign *invasion*, but when there is *danger* of invasion. The President of the United States is the sole arbiter of the question whether such danger exists, and he alone can call into action the proper force to meet it. He is the sole judge as to the place where the danger is, and he has a right to march his troops there, in whatever State or Territory it may be apprehended.

* *Lochington* v. *Smith*, Peters, C. C. Rep. 466.

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He may issue orders to his army to take such military measures as may, in his judgment, be necessary for public safety, whether these measures require the destruction of public or private property, the arrest or capture of persons, or other speedy and effectual military operations sanctioned by the laws of war. He may thus subject vast numbers of citizens to military duty under all the severity of martial law, whereby they are required to act under restraints more severe, and to incur dangers more formidable, than any mere arrest and detention in a safe place for a limited time. Such is the power of the President under the Constitution, and such is the lawful mode of applying it, according to the principles announced by the Supreme Court of the United States in the case of Martin *v.* Mott,* and affirmed in that of Luther *v.* Borden.† It is therefore now held as well settled law that, in time of civil war in a State, the apprehension of danger, and the right to use military power to prevent it, and to restrain the public enemy, are held to justify the violation of rights of person and property, invariably held sacred and inviolable in time of peace.

MILITARY ARRESTS MADE BY ALL GOVERNMENTS IN CIVIL WAR.

Capture of men and seizures of property are, all over the world, among the familiar proceedings of belligerents. No existing government has ever hesitated, while civil war was raging, to make military arrests.

* 12 Wheaton's Reports, p. 28.
† 8 Howard's Reports, p. 1.

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Nor could warlike operations be successfully conducted without a frequent use of the power to take and restrain hostile persons. Such is the lesson taught by the history of England and France. While the laws of war place in the hands of military commanders the power to capture, arrest, and imprison the army of the enemy, it would be unreasonable not to authorize them to capture a hostile individual, when his going at large would endanger the success of military operations. To carry on war with no right to seize and hold prisoners would be as impracticable as to carry on the administration of criminal law with no right to arrest and imprison culprits.*

PECULIAR NECESSITIES OF CIVIL WAR.

In foreign wars, where the belligerents are separated by territorial boundaries, or by difference of language, there is little difficulty in distinguishing friend from foe. But in civil war, those who are now antagonists, but yesterday walked in the same paths, gathered around the same fireside, worshipped at the same altar; there is no means of separating friend from

* See *Keys* v. *Tod.* Note, p. 223. Judge Dickey says, "It is not controverted but that the commander of an army may exercise, in proper cases, the power in question, over both property and person, within the territory and its vicinity under the control of the army, although martial law has not been declared, nor the civil law entirely suspended. What is it, then, but a partial exercise of martial law? And what gives the right but a military necessity, or emergency? And from what source does the power come, if not from the President, as commander-in-chief? Now, what good reason can there be for confining the power to and within the lines of the army, provided a like urgent necessity and emergency arises or exists at any other point outside of the lines of the army, and within the territory of the government or nation? What is the theatre of the present war in this country? Is it only that portion of the country included within the lines of the armies, which extend from the Chesapeake Bay to the spurs of the Rocky Mountains? or is it not rather the whole nation, the loyal States upon the one side, and the disloyal upon the other? and are not *all* within the vicinity of the lines of the armies, as far as that vicinity is to be considered as affecting the exercise of the authority in dispute?"

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foe, except by the single test of loyalty, or hostility to the government.

WHO OUGHT AND WHO OUGHT NOT TO BE ARRESTED.

All persons who *act* as public enemies, and all who by word or deed give reasonable cause to believe that they *intend* to act as such, may lawfully be arrested and detained by military authority, for the purpose of preventing the consequences of their acts. No person in a loyal State can rightfully be captured or detained unless he has engaged, or there is reasonable cause to believe that he intends to engage, in acts of hostility to the United States, that is to say, in acts which may tend to impede or embarrass the United States in such military proceedings as the commander-in-chief may rightfully institute.

MARKS OF HOSTILITY.

It is a sentiment of hostility which in time of war seeks to overthrow the government, to cripple its powers of self-defence, to destroy or depreciate its resources, to undermine confidence in its capacity or its integrity, to diminish, demoralize, or destroy its armies, or to break down confidence in those who are intrusted with its military operations in the field. He is a public enemy who seeks falsely to exalt the motives, character and capacity of armed traitors, to magnify their resources, to encourage their efforts by sowing dissensions at home, or by inviting intervention of foreign powers in our affairs. He who overrates the success, increases the confidence, and encourages the hopes of our adversaries, or underrates, diminishes or weakens our own, and he who seeks false causes of complaint

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against the officers of our government, or inflames party spirit among ourselves, for the purpose of impairing or destroying our power to suppress rebellion, gives to our enemies that moral support which is more valuable to them than regiments of soldiers or millions of dollars. All these ways and means of aiding a public enemy ought to be prevented or punished. But the connections between citizens residing in different sections of the country are so intimate, the divisions of opinion on political or military questions are so numerous, the balance of affection, of interest, and of loyalty is so nice in many instances, that civil war, like that which darkens the United States, is fraught with peculiar dangers, requires unusual precautions, and warrants and demands the most thorough and unhesitating measures for preventing acts of hostility, and for the security of public safety.

INSTANCES OF ACTS OF HOSTILITY.

Among hostile proceedings, which, in addition to those already suggested, justify military arrests, may be mentioned contraband trade with hostile districts, or commercial intercourse with them when forbidden by statutes or by military orders;* aiding the enemy by furnishing them with information which may be useful to them; correspondence with foreign authorities with a view to impede or unfavorably affect the negotiations or interests of the government;† enticing soldiers or sailors to desertion; prevention of enlistments; obstructing officers whose duty it is to

* See acts June 13, 1861, May 20, 1862, and March 12, 1863.
† See act February 12, 1863, chap. 60.

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ascertain the names of persons liable to do military duty, and to enroll them; resistance to the draft, to the organization or to the movements of soldiers; and aiding or assisting persons to escape from their military duty, by concealing them in the country or transporting them away from it.

NECESSITY OF POWER TO ARREST THOSE WHO RESIST DRAFT.

The ability to create and organize armies is the foundation of all power to suppress rebellion and repel invasion, or to execute the laws and support the Constitution, when they are assailed. Without the power to capture or arrest those who oppose the draft, no army can be raised. The necessity of such arrests is recognized by Congress in the 75th chapter of the act of March 3, 1863, for "enrolling the forces of the United States, and for other purposes," which provides for the *arrest* and punishment of those who oppose the draft. This provision is an essential part of the general system for raising an army, embodied in that statute. Those citizens who are secretly hostile to the Union may attempt to prevent the board of enrolment from proceeding with the draft, or may refuse, when drafted, to enter the service. Our military forces may rightfully be called upon to protect the lawful measures by which our armies are created. If the judiciary only could be relied on, to overcome those who resist the draft, then the power to raise armies would depend, in the last resort, upon the physical force which the judges could or would apply to the execution of their mandates. Thus, if the *posse comitatus* should not be able or willing to overpower those who

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oppose the draft, then no law could be enforced other than mob law and lynch law. If the power to raise armies be denied, the government will be broken down; and because we are too anxious to secure the supposed rights of certain individuals, all our rights will be trampled under foot.

TERRITORIAL EXTENT OF MARTIAL AND MILITARY LAW.

It is said that martial law must be confined to the immediate field of action of the contending armies, while in districts remote from battle-fields it has no force. Let us see the difficulty of this view. Is martial law to be enforced only where the movements of our enemy may carry it? Do we lose our military control of a district when the enemy have passed through and beyond it? Is not martial law in force between the base of operations of our army and the enemy's lines, even though it be a thousand miles from one to the other? Must there be two contending armies at close quarters with each other, in order to sanction the use of martial law? If not, can judges determine by rules of law, the distance which must intervene between the hostile forces before that law will cease to have effect? Has not every army, wheresoever it marches, power to enforce the laws of war? If a regiment of cavalry is stationed far from the scene of active military operations, or if a single file of soldiers is acting under a commanding officer, are they not governed by the same law? Have they not power, wherever they may be, to capture the enemy? Who is the enemy? Whoever makes war. Who makes war? Whoever aids and comforts the rebels

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commits treason; therefore he makes war.* A raid into a Northern State, with arms, is no more an act of hostility than a conspiracy to aid the enemy by Northern men in Northern States. Whether the enemy is an army, a regiment, or a single man, be the number of persons more or less, it is still the enemy.

All drafts of soldiers are made in places remote from the field of conflict. If no arrest can be made there, then the formation of the army can be prevented. Can a spy be arrested by martial law? Formerly there was no law of the United States against spies outside of camps. There was nothing but martial law against them. A spy from the rebel army, no one could doubt, should be arrested. Why should not a spy from the Northern States be arrested? It is obvious that the President, if deprived of the power to seize or capture the enemy, wherever they may be found, whether remote from the field of hostilities or near to it, cannot effectually suppress the rebellion. Stonewall Jackson, it is said, visited Baltimore a few months since in disguise. While there, it is not known that he committed any breach of the laws of Maryland or of the United States. Could he not have been captured, if he had been found, by the order of the President? If captured, could the State court of Maryland have ordered him to be surrendered to its judge, and so turned loose again?† Where is the limit within which the military power of the commander of the army must be confined, in making war against the enemy? Wherever military operations are actually extended, there is martial law. Whenever a person is helping the

* See Index, "Treason."
† See Milligan's case, p. 536, and remarks upon it in Notes to Forty-third Edition, p. 460.

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enemy, then he may be taken as an enemy; wherever such capture is made, there war is going on, there martial law is inaugurated, so far as that capture is concerned.

HABEAS CORPUS.*

The military or executive power to prevent prisoners of war from being subject to discharge by civil tribunals, or, in other words, the power to suspend, as to these prisoners, the privilege of *habeas corpus*, is an essential means of suppressing the rebellion and providing for the public safety, and is therefore, by necessary implication, conferred by the Constitution on that department of government to which belongs the duty of suppressing rebellion by force of arms, in time of war. In times of civil war or rebellion, it is the duty of the President to call out the army and navy to suppress it. To use the army effectually for that purpose, it is essential that the commanders should have the power of retaining in their control all persons captured and held in prison.

It must be presumed that the powers necessary to execute the duties of the President are conferred on him by the Constitution. Hence he must have the power to hold whatever persons he has a right to capture, without interference of courts, during the war, and he has the right to capture all persons who, he has reasonable cause to believe, are hostile to the Union, and are engaged in hostile acts. The power is to be exercised in emergencies. It is to be used suddenly. The facts on which public safety in time of civil war depends can be known only to the military men, and not,

* The privilege of the writ of *habeas corpus* was suspended by the Confederate Congress by act 1864, chap. 38.

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under ordinary circumstances, to the legislatures. To pass a law as to each prisoner's case, whenever public safety should require the privilege of the writ to be suspended, would be impracticable. Shall there be no power to suspend the writ, as to any single person in all the Northern States, unless Congress pass a law depriving all persons of that privilege? Oftentimes the exposure of the facts and circumstances requiring the suspension in one case would be injurious to the public service by betraying our secrets to the enemy. Few acts of hostility are more dangerous to public safety, none require a more severe treatment, either to prevent or to punish, than an attempt to interfere with the formation of the army by obstructing enlistments, by procuring desertions, or by aiding and assisting persons liable to do military duty in escaping from the performance of it. Military arrest and confinement in prison during the war are but a light punishment for a crime which, if successful, would place the country in the power of its enemies, and sacrifice the lives of soldiers now in the field, for want of support. Whoever keeps back the volunteers from our army strikes at the heart of the country. All those proceedings which tend to break down the army when in the field, or to prevent or impede any step necessary to be taken to collect and organize it, are acts of hostility which directly tend to impede the military operations on which the preservation of the government, in time of war, depends. All persons who commit such acts are subject to military arrest and detention; and if they are at the same time liable to prosecutions for violation of municipal

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laws, that fact cannot shelter them from liability to be treated as public enemies, and to be arrested and detained, so as to prevent them from perpetrating any further hostile acts.

In determining the character of acts committed in the free States by persons known to be opposed to the war, it must be borne in mind that those who, in the loyal States, aid and comfort the enemy, are partakers in the crime of rebellion as essentially as if present with rebel armies. They are in law *participes criminis*. Though their overt acts, taken alone and without connection with the rebellion, might not amount to treason, or to any crime, yet under the circumstances, many of these acts, otherwise innocent, become dangerous, injurious, and criminal. A person who, by his mere presence, lends support and gives confidence to a murderer while perpetrating his foul crime, shares in that crime, whether he is at the time of the murder in the actual presence of his victim, or stands off at a distance, and is ready to warn the cutthroat of the approach of danger. Such was the rule administered in the trial of Knapp for murdering a citizen of Massachusetts. This is familiar law. What difference does it make whether the conspirator is near, or far away from, his associates; whether he is in a slave or a free State? The real question is whether the person accused has given or means to give aid or comfort to the enemy of his country, whether near by or far off; if so, then he is an enemy, and may be captured on the doorsteps of a court-house, or even on the bench itself.

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CONSTITUTIONALITY OF THE ENROLMENT ACT OF MARCH 3, 1863.

No power to arrest or detain prisoners can be conferred upon the President or his provost marshals by an act of Congress which is void because unconstitutional. No person can be civilly or criminally liable to imprisonment for violation of a void statute. Hence the question may arise whether the enrolment act is a legitimate exercise by Congress of powers conferred upon it by the Constitution. That Congress has full power to pass the enrolment act is beyond reasonable doubt, as will be apparent from the following references: * —

The Constitution, article 1, section 8, clause 12, gives to Congress the power "to raise and support armies." It must be observed that the Constitution recognizes a clear distinction between the *army of the United States* and the *militia* of the several States, even when called into actual service. Thus, by article 2, section 2, clause 1, "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." By article 1, section 8, clause 15, Congress has power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." By article 1, section 8, clause 16, Congress has power "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the

* So decided in several cases since the publication of the first edition.

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militia according to the discipline prescribed by Congress." In addition to these powers of Congress to call into the service of the Union the militia of the States by requisitions upon the respective governors thereof, the Constitution confers upon Congress another distinct, independent power, by article 1, section 8, clause 12, which provides that Congress shall have power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years." By article 1, section 8, clause 14, Congress has power to make rules for the government and regulation of the land and naval forces. Article 1, section 8, clause 18, gives Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." The statutes of 1795, and other recent acts of 1861 and 1862, authorizing the enlistment of volunteers, were mainly founded on the power to receive militia of the States into the service of the Union, and troops were raised principally through the agency of governors of States. The enrolment act of 1863 is an exercise of power conferred upon Congress, to "raise and support armies,"* and not of the power to call out the militia of the States. Neither the governors nor other State authorities have any official functions to perform in relation to this act, nor any right to interfere with it. It is an act of the United States, to be administered by United States officers, applicable to citizens of the United States in the same way as all other national laws. The confounding of these separate powers of

* See Note to Forty-third Edition (No. 12), explanatory of this statute.

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Congress and the rights and proceedings derived from them has been a prolific source of error and misapprehension.

RULES OF INTERPRETATION AND THEIR APPLICATION TO THIS ACT.

The Constitution, as above cited, provides that Congress shall have power to pass "all laws necessary and proper" for carrying into execution all the powers granted to the government of the United States, or any department or officer thereof. The word "necessary," as used, is not limited by the additional word "proper," but is enlarged thereby.

"The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist WITHOUT LIMITATION, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means necessary to satisfy them. The circumstances which endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." * * "This power ought to be under the direction of the same councils which are appointed to preside over the *common defence*." * * "It must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community in any matter essential to its efficacy — that is, in any matter essential to the *formation*, *direction*, or *support* of the NATIONAL FORCES." * * "The *means* ought to be proportioned to the *end;* the persons from whose agency the attainment of the *end* is expected ought to possess the *means* by which it is to be attained."

This opinion of Alexander Hamilton has been confirmed by the Supreme Court of the United States, in a decision made by Chief Justice Marshall, and quoted in a former page.

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"The government of the United States is one of enumerated powers, and it can exercise only the powers granted to it; but though limited in its powers, it is supreme within its sphere of action. It is the government of the people of the United States, and emanated from them. Its powers were delegated by all, and it represents all, and acts for all.

"There is nothing in the Constitution which excludes *incidental* or *implied* powers. The articles of confederation gave nothing to the United States but what was expressly granted; but the new Constitution dropped the word *expressly*, and left the question whether a particular power was granted to depend on a fair construction of the whole instrument. No constitution can contain an accurate detail of all the subdivisions of its powers, and all the *means* by which they might be carried into execution. It would render it too prolix. Its nature requires that only the great outlines should be marked, and its important objects designated, and all the minor ingredients left to be deduced from the nature of those objects. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, were intrusted to the general government; and a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the people vitally depended, must also be intrusted with *ample means of their execution.* Unless the words imperiously require it, we ought not to adopt a construction which would impute to the framers of the Constitution, when granting great powers for the public good, the intention of impeding their exercise by withholding a *choice of means.* The powers given to the government imply the ordinary means of execution; and the government, in all sound reason and fair interpretation, must have the choice of the means which it deems the most convenient and appropriate to the execution of the power. The Constitution has not left the right of Congress to employ the necessary means for the execution of its powers to general reasoning. Art. 1, sect. 8, of the Constitution, expressly confers on Congress the power 'to make all laws that may be necessary and proper for carrying into execution the foregoing powers.'

"Congress may employ such means and pass such laws as it may deem necessary to carry into execution great powers granted by the Constitution; and *necessary* means, in the sense of the Constitution, does not import an absolute physical necessity so strong

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that one thing cannot exist without the other. It stands for any means calculated to produce the end. The word *necessary* admits of all degrees of comparison. A thing may be necessary, or very necessary, or absolutely or indispensably necessary. The word is used in various senses, and in its construction the subject, the context, the intention, are all to be taken into view. The powers of the government were given for the welfare of the nation. They were intended to endure for ages to come, and to be adapted to the various *crises* in human affairs. To prescribe the specific means by which government should in all future time execute its power, and to confine the choice of means to such narrow limits as should not leave it in the power of Congress to adopt any which might be appropriate and conducive to the end, would be most unwise and pernicious, because it would be an attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been foreseen dimly, and would deprive the legislature of the capacity to avail itself of experience, or to exercise its reason, and accommodate its legislation to circumstances. If the end be legitimate, and within the scope of the Constitution, all means which are appropriate, and plainly adapted to this end, and which are not prohibited by the Constitution, are lawful."

These authorities show that Congress, having the power to raise and support armies, has an unlimited choice of means appropriate for carrying that power into execution. The only question is whether the act of March 3, 1863, is "plainly adapted to the end proposed," namely, "*to raise an army.*" If it is a usual mode of raising an army to enroll and draft citizens, or, though unusual, if it is *one appropriate mode* by which the end may be accomplished, it is within the constitutional authority of Congress to pass that law.

In a republic, the country has a right to the military service of every citizen and subject. The government is a government of the people, and for the safety of the people. No man who enjoys its protection can lawfully escape his share of public burdens and duties. Public

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safety and welfare in time of war depend wholly upon the success of military operations. Whatever stands in the way of military success must be sacrificed, else all is lost. The triumph of arms is the *tabula in naufragio*, the last plank in the shipwreck, on which alone our chance of national life depends. Hence, in the struggle of a great people for existence, private rights, though not to be disregarded, become comparatively insignificant, and are held subject to the paramount rights of the community. The life of the nation must be preserved at all hazards, and the Constitution must not, without imperative necessity, be so construed as to deprive the people of the amplest means of self-defence. Every attempt to fetter the power of Congress to call into the field the military forces of the country in time of war, is only a denial of the people's right to fight in their own defence. If a foreign enemy were now to invade the country, who would dare to cavil at the forms of statutes under which the people sought to enlist volunteers to repel the invader? It must not be forgotten that Congress has the same power to-day to raise and organize armies to suppress rebellion, that would belong to it if the Union were called upon to meet the world in arms.

INDEMNITY TO PERSONS ARRESTED.

Persons who reside in a country engaged in active hostilities, and who so conduct themselves as to give reasonable cause to believe that they are aiding and comforting a public enemy, or that they are participating in any of those proceedings which tend to embarrass military operations, may be arrested; and if such persons shall be arrested and imprisoned for the

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purpose of punishing or preventing such acts of hostility, they are not entitled to claim indemnity for the injury to themselves or to their property, suffered by reason of such arrest and imprisonment.* If the persons so arrested are subjects of a foreign government, they cannot lawfully claim indemnity, because their own hostile conduct, while it has deprived them of the shelter of "neutrality," has subjected them to penalties for having violated the laws of war.† If a foreigner join the rebels, he exposes himself to the treatment of rebels. He can claim of this government no indemnity for wounds received in battle, or for loss of time, or for suffering by being captured and imprisoned. It can make no difference whether his acts of hostility to the United States are committed in open contest under a rebel flag, or in the loyal States, where his enmity is most dangerous. If it be said that he has violated no municipal law, and therefore ought not to be deprived of liberty without indemnity, it must be remembered that if he has violated any of the laws of war, he may have thereby committed an offence more dangerous to the country and more destructive in its consequences than any crime defined in statutes. If a person, detained in custody by reason of his having violated the laws of war, and for the purpose of preventing hostilities, be liberated from confinement without having been indicted by a grand jury, it does not follow therefrom that he has committed no crime. He may have been guilty of grave offences, while the government may not have deemed it necessary to

* *Note to Forty-third Edition.*— See indemnity acts of Congress. Index, title "Enemy.
† See Solicitor's Opinion in Sherwin's case, p. 365.

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prosecute him. Clemency and forbearance are not a just foundation for a claim of indemnity. An offender may not have been indicted, because the crime committed, being purely a military crime, or crime against martial law, may not have come within the jurisdiction of civil tribunals. The legality of his arrest and imprisonment under martial law, justified by military necessity, cannot be adjudicated by civil tribunals.* If the person so arrested is the subject of a foreign power, and claims exemption from arrest and custody for that reason, he can have no right to indemnity under any circumstances, by reason of being an alien, until such fact of alienage is made known to the government. His claim to indemnity thereafter will depend on a just application of the principles already stated.

* See *Vallandigham's* case, p. 338. See, also, Index, title "Judicial Power."

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INSTRUCTIONS OF THE WAR DEPARTMENT TO OFFICERS HAVING CHARGE OF DESERTERS.

WAR DEPARTMENT,
PROVOST MARSHAL GENERAL'S OFFICE,
Washington, D. C., July 1, 1863.

[CIRCULAR NO. 36.]

The following opinion of Hon. William Whiting, Solicitor of the War Department, is published for the information and guidance of all officers of this Bureau:

ARREST OF DESERTERS—HABEAS CORPUS.

Opinion.

It is enacted in the 7th section of the act approved March 3, 1863, entitled "An act for enrolling and calling out the national forces, and for other purposes," that it shall be the duty of the Provost Marshals appointed under this act "to arrest *all deserters, whether regulars, volunteers, militia men, or persons called into the service under this or any other act of Congress*, wherever they may be found, and to send them to the nearest military commander, or military post."

If a writ of *habeas corpus* shall be issued by a State court, and served upon the Provost Marshal while he holds under arrest a deserter, before he has had opportunity "to send him to the nearest military commander, or military post," the Provost Marshal is not at liberty to disregard that process. "It is the duty of the Marshal, or other person having custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. But after this return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.

"They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial

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tribunals can release him and afford him redress. And although, as we have said, it is the duty of the Marshal, or other person holding him, to make known, by a proper return, the authority under which he retains him, it is, at the same time, imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court, upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the Marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. 'No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.'"

The language above cited is that of Chief Justice Taney in the decision of the Supreme Court of the United States in the case of Ableman *vs.* Booth.—(21 Howard's Reports, 506.)

If a writ of *habeas corpus* shall have been sued out from a State court, and served upon the Provost Marshal while he holds the deserter under arrest, and before he has had time or opportunity to "send him to the nearest military commander, or military post," it is the duty of the Marshal to make to the court a respectful statement, in writing, as a return upon the writ, setting forth:

1st. That the respondent is Provost Marshal, duly appointed by the President of the United States, in accordance with the provisions of the act aforesaid.

2d. That the person held was arrested by said Marshal as a deserter, in accordance with the provision of the 7th section of the act aforesaid. That it is the legal duty of the respondent to deliver over said deserter "to the nearest military commander, or military post," and that the respondent intends to perform such duty as soon as possible.

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3d. That the production of said deserter in court would be inconsistent with, and in violation of the duty of the respondent as Provost Marshal, and that the said deserter is now held under authority of the United States. For these reasons, and without intending any disrespect to the honorable judge who issued process, he declines to produce said deserter, or to subject him to the process of the court.

To the foregoing all other material facts may be added.

Such return having been made, the jurisdiction of the State court over that case ceases. . If the State court shall proceed with the case and make any formal judgment in it, except that of dismissal, one of two courses must be taken. (1) The case may be carried up, by appeal or otherwise, to the highest court of the State, and removed therefrom by writ of error to the Supreme Court; or, (2) the judge may be personally dealt with in accordance with law, and with such instructions as may hereafter be issued in each case.

WILLIAM WHITING,
Solicitor of the War Department.

NOTE A. — For those who desire to examine the practice and authorities on the question whether a government has the right to treat its citizens while engaged in civil war, as belligerents or as subjects, reference may be had to the following, viz.: (Stephens') Blackstone's Com., Vol. 4, p. 286. Marten's Essai concernant les Armateurs, ch. 2, sect. 11. See 17 Geo. III. ch. 9 (1777). Pickering's Statutes, Vol. 31, p. 312. See President's Proclamation, April 19, 1861. U. S. Stat. at Large, 1861, App. p. ii. See charge of Nelson, J., in the report of the trial of the officers, &c., of *The Savannah*, p. 371. In this case the rebel privateer put in as a defence his commission to cruise under the Confederate flag; and the same defence was made before the United States Court in Philadelphia by other persons indicted for piracy. It was held in both of these tribunals, that they must *follow the decision of the executive and legislative departments* in determining the political status of the Confederate States; and, that the *exercise of belligerent* rights by the Federal Government *did not imply any waiver or renunciation of its sovereign or municipal rights, or rights to hold as subjects the belligerent inhabitants of the seceded States.* See the report of Smith's Trial, p. 96. The pirates tried in New York were not convicted. Those who were convicted in Philadelphia were not sentenced, but, by order of the Secretary of State (January 31, 1862), were sent to a military prison, to be exchanged as prisoners of war — this being done to avoid threatened retaliation.

See also authorities cited in Chapter II. p. 44.

It has been decided since the tenth edition was in type, that citizens of States in rebellion are considered as *public enemies, and are not entitled to sue in the courts of the United States*, by Nelson, J., U. S. C. C., of Minnesota. See *Nash* v. *Dayton*. A similar decision has been made by the Court of Appeals in Kentucky, and has been approved by Governor Bramlette. (See his Message to the House of Representatives, February 13, 1864.)

Note to Forty-third Edition. — Nor can public enemies appear as claimants in a case of prize. (*United States* v. *The Isaac Hemmett*, 10 Pits. Leg. Jour., 97; *United States* v. *The Alleghany*, Ib. 276; *United States* v. *One Hundred Barrels of Cement*, 12 Am. L. R. 735.) In *Mrs. Alexander's Cotton* case, the Supreme Court say, 1864-5 (2 Wallace, 421), "A public enemy can have no standing in any court of the United States so long as that relation exists." See Appendix, p. 532.

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KEES *v.* TOD.

This case has been decided in Ohio since the seventh edition of the "War Powers" went to press: —

John W. Kees *vs.* David Tod and others, Pickaway County Common Pleas; civil action. On petition to remove the case, for trial, to the United States Circuit Court.

The defendants, under the Act of Congress of March 3, 1863, present a sworn petition, stating the facts, clearly within the Act, and tendering surety as provided by the Act.

Section 4 of the Act provides, "That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending, or to be commenced, for any search or seizure, arrest or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue."

Section 5 provides, "That if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done. at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress, and the defendant shall, at the time of entering his appearance in such court, or, if such appearance shall have been entered before the passage of this Act, then at the next session of the court in which such suit or prosecution is pending, file a petition, stating the facts, and verified by affidavit, for the removal of the cause for trial at the next Circuit Court of the United States, to be holden in the district where the suit is pending, and offer good and sufficient surety for his filing in such court, on the first day of its session, copies of such process or proceedings against him, and also for his appearing in such court, and entering special bail in the cause, if special bail was originally required therein, it shall be the duty of the State court to accept the surety, and proceed no further in the cause or prosecution, and the bail that shall have been originally taken shall be discharged, and such copies being filed, as aforesaid, in such court of the United States, the cause shall proceed therein in the same manner as if it had been brought in said court by original process, whatever may be the amount in dispute or the damages claimed, or whatever the citizenship of the parties, any former law to the contrary notwithstanding.

OPINION OF JUDGE DICKEY.

The plaintiff brought his action in this court to recover damages for an alleged trespass and false imprisonment by the defendants, and filed his petition

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on the 14th of September, 1863, and caused summons to be issued and served, &c. In his petition he alleges that the defendants, on the 29th day of June, 1862, at the county of Pickaway, unlawfully and maliciously assaulted the plaintiff, and that the defendants, Bliss, Goodell, and Dougherty, at the instance and by the procurement of the defendants, Tod and Gregg, seized and laid hold of the plaintiff, and then and there unlawfully and maliciously, and without any reasonable and probable cause, arrested and imprisoned said plaintiff, with intention of having him carried out of the State of Ohio contrary to the laws thereof, and that defendants Scott and Goodell, then and there, at the instance and by the procurement of the said Tod, Dougherty, and Gregg, forced and compelled the said plaintiff to go from and out of his house, situate and being in said county of Pickaway, into the public street, and so on; charging that they compelled him to go out of the State of Ohio, to the military prison, called the "Old Capitol Prison," in Washington City, and there the defendants caused him to be unlawfully and maliciously, and against his will, without reasonable or probable cause, imprisoned for seventeen days, &c., to his damage, $30,000.

On the 27th of October, 1863, defendants Tod, Gregg, and Dougherty, the only defendants served with process, filed their petitions against the plaintiff Kees, stating, in substance, that the plaintiff Kees, on the 12th of September, 1863, filed his petition in the court, and commenced a civil action for the wrongs, injuries, &c., as stated in plaintiff's petition, making reference to it for particulars, and then going on to set forth that having been summoned, they come and enter their appearance to the plaintiff's action, and state, that, so far as the arrest, imprisonment, wrongs, &c., were committed, as alleged in plaintiff's petition, the same was done during the present rebellion, about the 29th day of June, 1862, and prior to the 3d day of March, 1863, by virtue and under color of authority derived from and exercised by the President of the United States, and by virtue of and under an order issued from the War Department of the United States (a copy of which order is given).

The defendants then, after a full statement of the facts as they claim them, relating to the authority, &c., further state, that they, desiring to have the case removed to the next Circuit Court of the United States, to be holden at Cincinnati, &c., come and offer good and sufficient surety, &c., and then pray this court to accept the surety and proceed no further in the case, and to make such further order as may be necessary for the removal of the case to the Circuit Court of the United States.

The following is the order of the War Department referred to:

War Department, Washington, D. C., June 27, 1862.

Sir: Proceed, with one assistant, by first train, to Circleville, in the State of Ohio, arrest there, or wherever else he may be found, John W. Kees, editor and publisher of the "Circleville Watchman," and deliver him to the commandant at Camp Chase, permitting no communication with him except by yourself, and your subordinates charged with his safe keeping, and, if you think fit, by his family in your presence. Examine all papers, private or otherwise.

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found at the office of the paper, the residence of Kees, or on his person, and bring with you to the department all that may be found of a treasonable or suspicious nature, as well as a copy of each issue of the "Watchman" during the last four months. Close the office, locking up the presses, type, paper, and other material found therein, and place it in charge of a discreet and trustworthy person, who will see that it is safely kept. If you think any further aid will be necessary, call on Governor Tod, at Columbus, who will be requested to give you such information and aid as you may think needful in enabling you to fulfil your duty.

Let this order be executed promptly, discreetly, and quietly; and, when executed, make full report of your doings hereunder to this department.

By order of the Secretary of War.

(Signed) C. P. WOLCOTT,
Assistant Secretary of War.

It was set forth in defendant's petition that this order was addressed to Wm. H. Scott, Washington, D. C., and delivered to him, and that he proceeded to its execution, and called at the Executive office, in Columbus, was given information in regard to Kees, his paper, and persons, to call on at Circleville, &c., by one of the Governor's staff; and that Scott did proceed to Circleville, and arrest Kees under and by virtue of the command of the order referred to, &c. And the petition of the defendant, David Tod, further states, that about the 6th of June, 1862, prior to the issuing of the order, the Circleville Watchman of that date, edited and published by Kees, was mailed to him as Governor, containing marked editorial articles, highly libellous, inflammatory, and treasonable in their character, well calculated and intended to prevent enlistments, weaken the military power of the government, and produce opposition to it in its efforts to crush the rebellion, and excite further rebellion—copies of which articles, and others of like character issued prior to the order, are shown with the petition.

The defendant Tod further states that he enclosed the Watchman containing the marked articles by mail to the Secretary of War, with a letter, calling the Secretary's attention to the marked articles, and hoping that the Secretary would at once put its editor, John W. Kees, with his secession rebel friends, in Camp Chase prison, where it would be his (the Governor's) pleasure to see that he (Kees) would be safely kept.

He further states that he has set forth his only connection with the alleged arrest, &c., and that he did nothing more; and all he did was in his capacity as Governor of Ohio, and in performance of his duty to the national government.

The case has been argued and heard upon the defendant's petitions for the removal of it to the Circuit Court of the United States.

It nowhere appears in the petition of the plaintiff, that the defendants, in the commission of the trespasses and wrongs against the person of the plaintiff, as alleged, were acting under any authority, or color of authority, from any source whatever. And so far as appears from the petition of the plaintiff, this Court has complete jurisdiction of the case.

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But, the defendants having filed their petitions for the removal of the case under the fifth section of the act of Congress, approved March 3, 1863, "relating to *habeas corpus* and regulating judicial proceedings in certain cases," which, if applicable, and not clearly invalid, so far as applicable, would require that the prayer of the defendants should be granted, no objection to the manner and form in which the application has been made having been raised by the plaintiff.

[Here follows the sections of the law, as quoted above.]

The mere reading of this fifth section, of itself, shows its applicability to the case before us; indeed, I believe that is not denied by the council for the plaintiff.

But it is claimed that the law is invalid, because not authorized by the Constitution of the United States, and because, when applied to the case in hand, is *ex post facto*, the right of action having accrued prior to the passage of the law. Whatever may be said of the attempt in the fourth section to create a defence, or provide an indemnity against trespasses committed prior to its passage, cannot be urged successfully against the fifth section, which only affects the remedy, and does not, in any manner, touch either the subject-matter of the action or of the defence.

These sections of the act are so far distinct and separable, that the fifth may be sustained independent of the fourth.

The object of the fourth section seems to be, to declare what is, or to provide what shall be, a defence in certain cases, to wit: "any order of the President, or under his authority." This applies only to cases where there *is an order*, and constitutes *such order* a defence in all courts where it shall be pleaded, whether in State or Federal Courts. The object of the fifth section is to provide a mode for the transfer of certain cases from the State to the Federal Courts, to wit: "all suits or prosecutions for act done or committed by virtue or under color of any authority derived from the President, or any act of Congress." This section applies to cases not included in the fourth section; it applies to all such cases as stated, whether there be any order or not.

In order to secure the benefit of it, its provisions must be strictly followed.

Thus it will be seen that either of these sections may be invoked without the other, and that the fifth is applicable to cases to which the fourth is not; and while the object of the fourth is to provide or declare rights, the object of the fifth is to regulate the practice in those and certain other cases. For these reasons, the two sections are so far separable and independent of each other, that the fifth may be held constitutional and the fourth unconstitutional. And, as it is not claimed that the fifth section is of itself unconstitutional, but only becomes so by reason of its inseparable connection with the fourth, I conclude that, as there is no such connection between them, the argument fails, and the Court may be justified in holding the fifth valid, without determining the validity of the fourth.

It will not be denied but that the Legislature of Ohio might, even after the right of an action of trespass in favor of a party had accrued against a Constable or Sheriff, pass a law providing that where such Constable or Sheriff had been sued in trespass, before a Justice of the Peace, as an individual, that if

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such officer desired to justify under a writ, and should make that known to the Justice, then it should be his duty to certify the case to a Court of Record having cognizance of the official acts of such defendant. Neither the subject-matter of the right of action nor the defence would be in the least interfered with; the mode of proceeding and the remedy are changed; that is all.

A more appropriate tribunal is provided; and so here this fifth section provides another tribunal — one having cognizance of United States officers, their official acts, and of the Constitution and laws of the United States, under which they act: no new defence is created, nor the right of action any way impaired. This section, therefore, is not invalid on the ground of its being retroactive.

It is, however, claimed that the facts set forth in the petition of defendant can constitute no defence, as the order under which the arrest was made was issued without authority under the Constitution of the United States, or the laws thereof, and that the fourth section of the act cannot support the defence, although in terms it may include it — for two reasons: first, because *that* section attempts to create a defence to a valid cause of action after it arose, and is, therefore, retroactive; and, second, because Congress can confer no power on the President to issue, or cause to be issued, such orders, either in time of war or peace, by virtue of any grant in the Constitution, by inference or otherwise; and that the *attempt*, therefore, to make such defence, is a nullity, and being so, the defence and the application to remove must fall together.

As to the first reason, suffice it to say, "sufficient unto the day is the evil thereof." When the defence provided by the fourth section is set up upon the trial of the cause upon its merits, either in this court or in the court to which it may be removed, it will be time enough to decide the question. To do so now would be to prejudge the case without a full hearing on the merits, and, if decided for the defendants, there would be no need for a removal, and if for the plaintiff, the only matter left would be an inquiry into damages; it would be equivalent to the decision of a demurrer to defendant's answer, on this preliminary application, and would be taking from the tribunal whose jurisdiction is sought, one of the questions upon which it should pass.

Again, granting that this fourth section is, so far as the case at bar is concerned, *ex post facto* in terms, and should be so held when the case is tried upon its merits, we are brought to consider the second reason given for its invalidity. Suppose the power to issue the order in question existed in the President, independent of section fourth, would its enactment annul that power, or only declare it? The act in question does not attempt to confer the power on the President to issue, or cause to be issued, such order; it merely declares that such orders, when issued shall be a good defence, proceeding upon the hypothesis, as we suppose, that he always possessed the power; so that in this view the fourth section partakes more of the nature of an act declaratory, than of the enactment of a new law conferring power. Enough, perhaps, has already been said to justify this court in granting the prayer of the defendants' petitions, and leave the question as to the authority of the War Department to issue the order set forth, for decision in the Circuit Court as the appropriate tribunal. But, inasmuch as it is claimed by the plaintiff, that no such authority, or color of authority exists, and that therefore there is no foundation for the jurisdiction

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sought by the defendants, I will proceed to offer reasons and authority, to show that it is at least a question of serious doubt, and, therefore, proper for the United States Court, as the doubt should be resolved in favor of the law.

Then, let us inquire into the power of the President, under the constitution, as commander-in chief of the army and navy, in time of a fearful rebellion like the present, to issue, or cause to be issued, such orders of arrest, &c. We all know the history of the sad times that have fallen upon us. The fact of a most violent, bloody, and terrific war, threatening our entire destruction as a nation — the imminent and immediate danger which threatens us in all we have and are in life — and of this contemporaneous history, of course the court should and will take notice.

In view of this, then, let us turn to the petition of the defendant David Tod, and ascertain, if we can, something of the cause of the arrest. It appears in the petition that the defendant, prior to the issuing of the order, wrote a letter to the War Department, enclosing certain marked editorials of the Watchman, of which Kees was editor and publisher, calling the attention of the Secretary of War thereto, and expressing a hope that the Secretary would at once put Kees, with his secession rebel friends, in Camp Chase Prison, &c. Copies of the editorials are referred to in, and filed with, the petition. In the article of June 6, 1862, this passage occurs: "We advised all Democrats to stay at home, and let the authors and provokers of this war, the Abolition Republicans, fight out their own war themselves; this is what ought to have been done. If such had been the policy of the Democracy, we would not to-day have a devastated country, drenched in fraternal blood." Again, in an editorial article of the Watchman, June 13, 1862, is this question, (after speaking of Ben. Butler in exceedingly harsh terms,) "Why don't the men of New Orleans shoot the infamous wretch like they would a reptile or a dog." These, with many kindred extracts, are filed with the petition, and are characterized in the petition of Governor Tod as highly libellous, inflammatory and treasonable in character, well calculated and intended to prevent enlistments, weaken the military power of the government, and produce opposition to it in its efforts to crush the rebellion, and excite further rebellion. This is all the information we have as to the cause of the arrest of Kees; whether the War Department had other and further foundation we know not — the presumption is, so far as this motion is concerned, that the information it had, whether under oath or otherwise, was deemed sufficient by it, for his arrest; sufficient to establish the fact, that the danger from Kees to the public service, while left at liberty, was immediate and impending, and that the urgent necessity for the public service demanded his arrest. Whether this was so or not, I do not undertake to say, nor is it necessary to decide, in disposing of this motion.

Article 3d, Section 2d, of the Federal Constitution provides that "The judicial power (of the United States) shall extend to all *cases* in law and equity *arising under this Constitution* and the laws of the United States," &c.

The President is commander in-chief of the army and navy, by express provision of the Constitution. Now, if the power to issue this order of arrest is incident to his office as Commander-in-chief, then, by necessary implication, the power is derived from the Constitution, without the aid of the fourth section

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referred to, and, if Kees was arrested by virtue of such order, then the case arose under the constitution, and the United States courts have jurisdiction, and, as we have seen, it may be transferred in the manner pointed out by the fifth section of that act, independent of the fourth.

And, if such power belongs to the President, as an incident to his office of Commander-in-chief, no question but he may transfer it to his subordinates, for all the war power vested in him may be, and is, distributed to the vast army of war officers who act under him as his agents. Upon this question there is, and has been, a great conflict of opinion, both legal and political. The order by which Mr. Vallandigham was arrested, was from the same source of power. Judge Leavitt passed upon the question and upheld the power, and Mr. Vallandigham was tried and sentenced under it.

It is claimed that the power in question is exercised under what is called martial law, or the right of war, and not under military law, which, it is said, is defined by the articles of war and the decisions under them, and is for the government of the army, &c. And it is claimed that this martial authority belongs, as a necessary incident, to the commander-in-chief, and that when that office is conferred, the necessary incident, in time of war, is conferred with it, and is as much a part of the office as any other.

Now, if this be so, it follows, of course, that when the office of commander-in-chief is conferred by the Constitution upon the President, this martial power is also conferred and secured, as clearly as the right of trial by jury, the liberty of the person, the freedom of speech and of the press, is secured to the citizen in time of peace.

The question here is, not whether the power was exercised under proper restraint, but whether it exists all, and it is not necessary to its exercise that martial law shall first have been declared. Cases are numerous, both in America and in Europe, where the authority, of the nature of the power in question has been exercised in time of war, by the commander-in-chief and his subordinates, in the absence of the declaration of martial law, and afterwards sustained by the civil courts. In the case of Mitchell *vs.* Harmony, reported in 13 Howard, 115, which was an action brought by the plaintiff against the defendant, to recover damages for the seizure of property, as a commander in the Mexican war, under the pretext of military necessity, Chief Justice Taney, in delivering the opinion of the court in that case, said, "It is impossible to define the particular circumstances of danger or necessity in which the power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right. In deciding upon this necessity, however, the state of facts, as they appeared to the officer at the time he acted, must govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely on, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it, and the discovery afterwards, that it was false and erroneous, will not make him a trespasser." Now, it is urged that the power exercised by the defendants in the case named, was a partial exercise of martial law, and did not depend upon time or place, but upon the *emergency*, and that it was the *emergency* that gave the right to exercise it.

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Chancellor Kent lays down the doctrine that martial law is quite a distinct thing from military law; that it exists only in time of war, and originates only in military necessity. It derives no authority from the civil law, no assistance from the civil tribunals, for it overrules, suspends, and replaces them. See Cushing's Opinions of Attorney Generals of the United States, vol. 8, page 365, &c., and the authorities there cited. See also the case of Luther *vs.* Borden, *et. al.*, 7 Howard, page 1.

It is also claimed that Washington's army exercised the power in question, during the whiskey insurrection of 1794 and 1795, and that General Wilkinson, under the authority of Jefferson, exercised it during the Burr conspiracy, in 1806; and that General Jackson called it into requisition at New Orleans, in 1814.

In the case of the application of Nicholas Kemp, for a writ of *habeas corpus*, the Supreme Court of Wisconsin recently decided against the power it gave the President to suspend the writ, but recognized the war right, or martial law, under certain limitations.

See also the case of Brown *vs.* the United States, book 8, Cranch, page 153, where Chief Justice Marshall, in delivering the opinion of the court, holds that "as a consequence of the power of declaring war and making treaties, &c., when the legislative authority has declared war, the Executive, to whom its execution is confided, is bound to carry it into effect; he has a *discretion* vested in him as to the *manner* and *extent:* but he cannot, morally, transcend the rules of warfare established among civilized nations."

See Vattel, pages 5 and 6, where the rule is laid down, that "a nation has a right to every thing that can help to ward off imminent dangers, and keep at a distance whatever is capable of causing its ruin, and that from the very same reasons that establish its rights to the things necessary for its preservation." He also lays down the rule, that the same rules of war apply to civil as to foreign wars.

It is not controverted but that the commander of an army may exercise, in proper cases, the power in question, over both property and person, within the territory and its vicinity under the control of the army, although martial law has not been declared, nor the civil law entirely suspended. What is it, then, but a partial exercise of martial law? And what gives the right but a military necessity, or emergency? And from what source does the power come, if not from the President, as commander-in-chief? Now, what good reason can there be for confining the power to and within the lines of the army, provided a like urgent necessity and emergency arises or exists at any other point outside of the lines of the army, and within the territory of the government or nation? What is the theatre of the present war in this country? Is it only that portion of the country included within the lines of the armies, which extend from the Chesapeake Bay to the spurs of the Rocky Mountains? or is it not rather the whole nation, the loyal States upon the one side, and the disloyal upon the other? and are not *all* within the vicinity of the lines of the armies, as far as that vicinity is to be considered as affecting the exercise of the authority in dispute?

The right to impress private property, either for the use of the government, or to prevent it from falling into the hands of the enemy, arising from urgent

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necessity, or from immediate impending danger, any where within the territory of the country, although outside the lines of the army, has never, that I am aware of, been disputed; but whether the emergency existed, or the impressment was properly made, may be disputed, and is a question of fact. There are numerous instances where this power has been exercised outside of the lines of the army, and no one has doubted its legitimacy. Railroads and telegraphs, with their machinery and employès, are frequently seized and impressed into the service of the government, and controlled per force, and the emergency relied upon to justify the act, the whole country acquiescing therein. In such cases the commander must be the judge of the urgent necessity, and if he decides that the necessity exists, and issues the order for the impressment, his subordinates are bound to obey. And it would seem from a well-settled principle of the common law that such subordinates would be justified, although their commander may have had but slight foundation for the exercise of the authority, and this upon the principle that, if the power existed at all, the commander, and not the soldier, is to judge of the limitations under which it is to be exercised. If the order is wanton, the party injured has his remedy against the commander. If it is said that the recognition of such a doctrine is dangerous to the liberties and rights of the people, and tends to subvert free government and establish despotism, the answer is, that the *abuse* of any power tends to the same end, and that it is the abuse, and not the legitimate exercise of it, which makes it dangerous. The limitations are well defined, and if he who undertakes to exercise it oversteps the bounds, he may be called to an account; and if the President corruptly and wantonly exercises it, he may be impeached, and at the end of his term the people will correct the error. But it is claimed, that although the authority may be exercised over property as stated, yet it cannot be so exercised over persons, although the same danger and urgent necessity may exist; for the reason that, in the case of the impressment of property, a compensation is made by the government to the owner, while in the case of the arrest of the person no such compensation can be made. Now, does the fact of compensation give the right to impress? It is not so laid down by any authority which has come under my notice. Compensation is not the test of the right, but one of the results of the act. The right arises from a far higher source, to wit, the right of a nation to do any act which will ward off a dangerous blow aimed at its existence, and which tends to preserve its life in time of war.

This test, it is claimed with great force, applies as well to the arrest of a person as to the impressment of his property, under proper restraints and in a proper case.

But, again, it is claimed that the recognition of this doctrine subverts the guarantees of the Constitution, of the right of trial by jury, and against unreasonable search, seizure &c. While, on the other hand, it is argued that the power is incident to the office of commander-in-chief of the armies in time of war, and necessarily implied. And, I ask, is this not true when the case arises within the limits of the army, where its exercise is uncontroverted? And if the guarantees of the Constitution are inapplicable in the one case, are they not equally so in the other? and if the immediate danger and urgent necessity is

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the foundation of the right, and that may be exercised outside as well as inside the lines, where is the line of distinction to be drawn?

Again, was the order of arrest in question issued upon the charge of the commission of any crime, or only because there was supposed to be imminent and impending danger that an irreparable injury would be committed, and in this view may not the government act upon the same principle that civil courts act in cases of peace warrants? Where a citizen has been arrested and brought before the court on a peace warrant, and tried, without a jury, and the court find that the complainant has just cause to fear, and does fear, that the accused will kill him, the court will require bail to keep the peace, and, in default of bail, will imprison the defendant, not for any crime that he has committed, but for fear that he will commit an irreparable injury. Now, shall the government be denied a remedy in a like case, where an irreparable injury to it in time of war is threatened and impending, and where the commander-in-chief, or his subordinates, are convinced that a citizen, inimical to the government, is about to commit some act against the government and in favor of the enemy, which, if committed, will be irreparable, and that there is imminent and immediate danger that the act will be committed? May not the authorities, in order to prevent it, take steps to avert it, and, if necessity requires, to restrain such citizen per force — even by imprisonment — until the danger is past, although no crime has actually been committed, and this be justified under the usages of war, or a partial exercise of martial law, it matters not by what name it is called?

I do not intend to decide, nor do I wish to be understood as deciding, whether the Secretary of War was justifiable in issuing the order in question, or whether the defendants can justify under it, for that, I consider, should be left for the trial on the merits of the case.

I have made these suggestions, and cited authorities to show, that it would look like an unwarranted usurpation in this court, more dangerous, perhaps, than the military power objected to, to pass upon and nullify the fifth section of the act of Congress, under which the defendants' petitions are filed, in this summary and preliminary proceeding, and thus wrench from the defendants, who stand in a United States relation to the case, the right to have it heard and determined by a United States court.

The plaintiff has all the guarantees for a fair and impartial hearing and trial in that court that he has in the State courts; and, besides, one principal reason why such cases should be tried in the Federal courts, is, to secure uniformity in the rules governing such cases. If it were left to the State courts — as these cases concerning United States laws, Constitution, and officers arise in every State — there might be as great a variety of contradictory decisions as there are State courts. The consequence would be, that no man would or could know the law governing United States officers, and the affairs of the nation would run into utter confusion, and the officer would be constantly liable to be harassed in each State, and subject to a different law or rule every time he crossed a State line. The prayer of the defendants' petitions is granted.

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RETURN

OF

REBELLIOUS STATES

TO THE UNION.

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THE

RETURN OF REBELLIOUS STATES

TO THE UNION.*

TWOFOLD WAR.

However brilliant the success of our military operations has been, the country is encompassed by dangers. Two wars are still waged between the citizens of the United States — a war of Arms and a war of Ideas. Achievements in the field cannot much outstrip our moral victories. While we fix our attention upon the checkered fortunes of our brave soldiers, and trace their marches over hills and valleys made memorable through all time by their disasters or their triumphs; while, agitated by hope and fear, by exultation and disappointment, we see our brothers and sons mourn-

* During the spring and summer of 1863, efforts were made by certain citizens of Florida, Louisiana, Arkansas, and Eastern Virginia to obtain the assent of the President to the formation of local State governments, and to the recognition thereof by the Executive and Legislative Departments. The views on this subject contained in the following pages, having been communicated verbally to the President, were subsequently embodied in a letter to the Union League of Philadelphia, published July 28, 1863.

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ing the loss of thousands of their companions in arms, yet marching joyfully to the post of danger and of honor; while we follow with intense solicitude the movements of our vast armies advancing with unfaltering courage against a powerful and desperate foe, — let us not forget that more majestic contest waged by men not less heroic, for victories not less renowned than those which have been won on battle-fields. The deadliest struggle in this rebellion is that of barbarism against civilization, slavery against freedom, aristocracy against republicanism, and treason against loyalty. The true patriot will watch with profound interest the fortunes of this intellectual and moral conflict, because the issue involves the country's safety, prosperity, and honor. If victory shall crown the efforts of those brave men who believe and trust in God, then shall all this bloody sacrifice be consecrated, and years of suffering shall exalt us among the nations; if they fail, no triumph of brute force can compensate the world for our unfathomable degradation. Let us, then, endeavor to appreciate the difficulties of our present position.

BREAKERS AHEAD.

Of several subjects, to which, were it now in my power, I would ask your earnest attention, I can speak of one only. As the success of the Union cause shall become more certain and apparent to our enemies in the rebel States, they will lay down arms and cease fighting. Their intense and relentless hatred of the Government, of Northern men who are not traitors, and

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of Southern men who are loyal, will still remain festering in every fibre of their hearts, and will be made, if possible, more bitter by the humiliation of conquest and subjection. The foot of the conqueror planted upon their proud necks will not sweeten their tempers. Their defiant and treacherous nature will seek to revenge itself in murders, assassinations, and all underhand methods of venting a spite which they dare not manifest by open war, and in driving out from their borders all loyal men. To believe that sincere attachment to the Union will survive in the hearts of a hostile people who have strained every nerve and made every sacrifice to destroy it, would require the most pitiable credulity.

The slaveholding inhabitants of the conquered districts will begin by asserting their claim to exercise the powers of government in accordance with their construction of State rights; they will try to get control of the lands, personal property, slaves, free blacks, and poor whites, and, through the instrumentality of local laws, made to answer their own purposes, to acquire the means of opposing and preventing the execution of the constitution and laws of the United States, within the region of country occupied by them. Thus, for instance, when the people of South Carolina shall have ceased fighting, they will say to the President, "We have now laid down our arms; we submit to the authority of the United States government. You may restore your custom-houses, your courts of justice, and, if we hold any public property, we give it up: we now have chosen senators and representatives; we demand their admission to Congress, the full recogni-

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tion of our State rights, and the restoration of our former privileges and immunities as citizens of the United States." Claims like these will be made by men who are traitors at heart; men who hate and despise the Union; men who never had a patriotic sentiment; men who, if they could, would hang every friend of the government. But for the sake of getting into their own hands, by our concession, power which they could not obtain by fighting, and to avoid the penalty of their national crimes, they will attempt to destroy the Union under the guise of claiming State rights.

CONSEQUENCES OF BEING OUTWITTED BY REBELS.

What will be the consequence of yielding to these demands? Our public enemy will gain the right of managing their affairs according to their will and pleasure, and not according to the will and pleasure of the people of the United States. They will be enabled, by the intervention of their State laws and State courts, to put and maintain themselves in effectual and perpetual opposition to the laws and constitution of the United States, as they have done for more than thirty-five years. They will have the power to pass such local laws as will practically exclude from the slave States all northern men, all soldiers, all free blacks, and all persons and things which shall be inconsistent with the theory of making slavery the corner-stone of their local government; and they may make slavery perpetual, in violation of the laws of the United States and the proclamations of the President.

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They may continue the enforcement of that class of statutes against free speech and freedom of the press, which will forever exclude popular education, and all other means of moral, social, and political advancement. They may send back to Congress the same traitors and conspirators who have once betrayed the country into civil war, and who will thwart and embarrass all measures tending to restore the Union by harmonizing the interests and the institutions of the people, and so, under the guise of submission, amnesty, and restoration, they may gain by fraud and treason that which they could not achieve by feats of arms. The insane theory of State rights will be nourished and strengthened if we treat a conquered people as our equals, and its baleful influence cannot be avoided! To satisfy traitors, the solemn pledge of freedom offered to colored citizens by Congress and by the Proclamation must be broken, and the country and the government must be covered with such unspeakable infamy, that even foreign nations might then justly hold us guilty of treachery to the cause of civilization and of humanity.

Suppose that the rebellion had been already quelled, would you give to your enemy the power of making your laws? Eastern Virginia, Florida, and Louisiana are now (1863) knocking at the door of Congress for admission into the Union. Citizens from the South have come to Washington, chosen to office by a handful of associates, elevated by revolution to unaccustomed dignity, representing themselves as loyal Union men, and earnest to have State rights bestowed on their constituents. If they should be clothed with the

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power to constitute States in the Union, into whose hands will their State governments be sure to fall? Beware of committing yourselves to the fatal doctrine of recognizing the existence in the Union, of States which have been declared by the President's Proclamation to be in rebellion, else, by this new device of the enemy, this new version of the poisonous State rights doctrine, the secessionists will be able to get back by fraud what they failed to get by fighting. Do not permit them, without proper safeguards, to resume in your counsels in the Senate and in the House the power which their treason has stripped from them. Do not allow old States, with their constitutions still unaltered, to resume State powers. Be true to the Union men of the South. Trust not designing politicians in the border States. The rebel districts contain ten times as many traitors as loyal men. The traitors will have a vast majority of the votes. Clothed with State rights under our constitution, they will crush every Union man by the irresistible power of their legislation. If you would be true to the patriots of the South, you must not bind them hand and foot, nor deliver them over to their bitterest enemies.

STATE RIGHTS IN CIVIL WAR.

Beware of entangling yourselves with the technical doctrines of forfeiture of State rights, as such doctrines admit, by necessary implication, the validity of a code of laws, and of corresponding civil and political rights, which you deny. To preserve the Union, requires only the strict enforcement

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against public enemies of our belligerent rights of civil war.

ATTITUDE OF THE GOVERNMENT IN THE BEGINNING OF THE WAR TOWARDS THE REBELS, AND TOWARDS LOYAL MEN IN REBEL DISTRICTS.

When the insurrection commenced by illegal acts of secession, and by certain exhibitions of force against the government, in distant parts of the country, it was supposed that the insurgents might be quelled, and peace might be restored, without requiring a large military force, and without involving those who did not actively participate in overt acts of treason.

Hence the government, relying upon the patriotism of the people, and confident in its strength, exhibited a generous forbearance towards the insurrection.

When, at last, 75,000 of the militia were called out, the President, still relying upon the Union sentiment of the South, announced his intention not to injure peaceful citizens, but, on the contrary, to regard them as still under the protection of the constitution. The action of Congress was in accordance with this policy. The war waged by this government was then a personal war against rebels; a war prosecuted in the hope and belief that the body of the people were well disposed towards the Union, and would soon right themselves by the aid of the army. Hence Congress declared, and the President proclaimed, that it was not their purpose to interfere with private rights or domestic institutions.

THE PROGRESS OF EVENTS CHANGED THE CHARACTER OF THE WAR, AND REQUIRED THE USE OF MORE EFFECTIVE WAR POWERS.

This position of the government towards the rebellious States was forbearing, magnanimous, and just,

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while the citizens thereof were generally loyal. But the revolution swept onward. The entire circle of the southern States abandoned the Union, and carried with them all the border States within their influence or control.

Having set up a new government for themselves; having declared war against us; having sought foreign aid; having passed acts of non-intercourse; having seized public property, and made attempts to invade States which refused to serve their cause; having raised and maintained large armies and an incipient navy; assuming, in all respects, to act as an independent, hostile nation, at war with the United States — claiming belligerent rights as an independent people alone could claim them, and offering to enter into treaties of alliance with foreign countries and treaties of peace with ours — under these circumstances they were no longer merely insurgents and rebels, but became a belligerent public enemy. The war was no longer against "certain persons" in the rebellious States. It became a territorial war; that is to say, a war by all persons situated in the belligerent territory against the United States.

CONSEQUENCES RESULTING FROM CIVIL TERRITORIAL WAR.

It is a settled rule of public law that whenever two nations are at war, every subject of one belligerent is a public enemy of the other.* If we were at war with England, every Englishman would become our public enemy, irrespective of his personal feelings towards us.

* See Twiss, Law of Nations, pp. 80–82, sect. 43; Vattel, *Droit des Gens*, L. II. c. 2; Prize Cases, p. 141, 248, and cases in the Appendix.

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However friendly he might be towards America, his ships on the sea would be liable to capture, his property, situated in this country, would be subject to confiscation, and himself would be liable to be killed in battle. An individual may be a personal friend, and at the same time a public enemy, of the United States. When the civil war in America became territorial, every citizen residing in the belligerent districts became our public enemy, irrespective of his private sentiments, whether loyal or disloyal, friendly or hostile, unionist or secessionist, innocent or guilty. As public enemies these insurgents claim to be exchanged as prisoners of war. They deny our right to hang them as murderers or pirates. As public enemies they assume authority to make war upon us, and to repudiate many obligations which they would voluntarily perform if they should acknowledge the binding power or seek the protection of our constitution. If they had sought to secure State rights, under that constitution, they would not have violated every one of its provisions which limit the powers of States. Asserting no such rights, they claim immunity as States, as a people, or as individuals, from all obligations to this government or to the United States.

WHEN DID THE REBELLION BECOME A TERRITORIAL WAR?

This question has been settled by the Supreme Court of the United States, in the case of the Hiawatha, decided on the 9th of March, 1863. In that case, which should be read and studied by every citizen of the Union, the members of the court differed in opinion as to the time when the war became territorial. The majority decided, that when the fact of general hostili-

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ties existed, the war was territorial, and the Supreme Court was bound to take judicial cognizance thereof. The minority argued that, as Congress alone had power to declare war, so Congress alone has power to recognize the existence of war; and they contended that it was not until the Act of Congress of July 13, 1861, commonly called the Non-intercourse Act, that a state of civil, territorial war was legitimately recognized. All the judges agree in the position "that since July 13, 1861, there has existed between the United States and the Confederate States, civil, territorial war."

WHAT ARE THE RIGHTS OF THE PUBLIC ENEMY SINCE THE REBELLION BECAME A TERRITORIAL CIVIL WAR.

The Supreme Court have decided, in the case above named, in effect:* "That since that time the United

* If this decision be restricted to its most technical and narrow limits, the only point actually decided was, that the captured vessels and cargoes were lawful prize. The parties before the court are alone bound by the judgment. Viewed in like manner, the only point decided in the case of Dred Scott was, that the court had no jurisdiction of the matter. Nevertheless, learned judges have taken occasion to express opinions upon legal or political questions. Their opinions are of great importance, not because they are or are not *technical decisions* of points in issue, but because they record the deliberate judgment of those to whom the same questions will be referred for final determination. The judge who has pronounced an extra-judicial opinion, and has placed it upon the records of the court, is not, it may be said, *bound* to follow it; but it is equally true, that the court is never bound to follow its previous most solemn "*decisions.*" These decisions may be, and often have been, modified, overruled, or disregarded by the same court which pronounced them. If the members of a judicial tribunal, though differing upon minor questions, agree upon certain fundamental propositions, it is worse than useless to deny that these propositions, even though not "*technically decided,*" *have the authoritative sanction of the court.* The unanimous agreement of all the members of a judicial court to certain principles, affords to the community as satisfactory evidence of their views of the law as could be derived from a decision in which these principles were technically the points in controversy. It is for these reasons that it has been stated in

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States have full belligerent rights against all persons residing in the districts declared by the President's Proclamation to be in rebellion."

That the laws of war, "whether that war be civil or *inter*

qualified language "that the Supreme Court have *decided in effect*" the propositions quoted from their opinions.

To show wherein all the judges agree, the following extracts are collected from the Decision and from the Dissenting Opinion.

EXTRACTS FROM THE OPINION OF THE COURT.

"As a civil war is never publicly proclaimed *eo nomine*, against insurgents, its *actual existence* is a fact in our domestic history, which the court is bound to notice and to know. The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: 'When the course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, CIVIL WAR EXISTS, *and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.*' See 2 Black R. 667, 668.

No declaration of war is necessary in case of civil war.

Test of its existence.

Rebels to be treated as foreign invaders.

"They (foreign nations) cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government, and paralyze its powers by *subtle* definitions and ingenious sophisms. The law of nations is also called the law of nature. It is founded on the common sense as well as the common consent of the world. It *contains no such anomalous doctrine*, as that which this court is now, for the first time, desired to pronounce, to wit, 'that insurgents, who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies*, because they are TRAITORS; and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the President, in fulfilling his duties as commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to *accord to them the character*

President must decide whether the enemy shall be deemed belligerents.

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gentes, converts every citizen of the hostile State into a public enemy, and treats him accordingly, whatever may have been his previous conduct."

That all the rights derived from the laws of war

Court must follow the decision of the President.

of belligerents, is a question to be decided by him, *and this court must be governed* by the decision and acts of the *political department* of the government to which this power was intrusted. *He* must determine what degree of force the crisis demands." The proclamation of blockade is of itself official and conclusive evidence to the court that a *state of war* existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

Belligerent right to seizure and destruction of enemy's property of all kinds, on land or sea.

"*The right of one belligerent, not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence* it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy by capturing his property on the high seas." Page 671.

CONFISCATION.

All persons residing in belligerent districts are *public enemies*, and their property liable to be captured.

"*All persons* residing within this territory (seceded States) whose property may be used to increase the revenues of the hostile power, are, in this contest, *liable to be treated as enemies*, though not foreigners. *They have cast off their allegiance, and made war on their government, and are none* the less *enemies because they are traitors.*" Opinion, page 674.

EXTRACTS FROM THE DISSENTING OPINION.

Public war entitles both parties to *the rights of war* against each other.

"A contest by force, between independent sovereign States, is called a *public* war; and when duly commenced, by proclamation or otherwise, *it entitles both of the belligerent parties to all the rights of war against each other*, and as respects neutral nations." Page 686, 687.

Legal consequences of war, shown by international law.

"*The legal consequences* resulting from a *state of war* between two countries, at this day, are well understood, and will be found described in every approved work on the subject of international law."

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may now, since 1861, be lawfully and constitutionally exercised against all the citizens of the districts in rebellion.*

People of the two countries become, in law, enemies.

All enemies' property on land and sea is subject to capture and confiscation.

"The *people of the two countries immediately become the enemies of each other, &c. . . . All the property* of the people of the two countries, *on land or sea,* is subject to *capture and confiscation* by the adverse party as enemies' property, with certain qualifications as it respects property on land. (Brown *vs.* U. S., 8 Cranch, 110.) All treaties between the belligerent parties are annulled." Page 677.

"This great and pervading change in the existing condition of a country, and in the relation of all her citizens or subjects, external and internal, is the immediate effect and result of a state of war." Page 688.

The government may recognize civil war.

Civil war draws after it all the rights of war, the same as in a foreign war.

"In the case of a *rebellion,* or resistance of a portion of the people of a country, against the established government, there is *no doubt,* if, in its progress and enlargement, the *government thus sought to be* overthrown, *sees fit,* it may, by the competent power, recognize or declare the existence of a *state of civil war, which will draw after it all the consequences and rights of war, between the contending parties, as in the case of a public war,* Mr. Wheaton observes, speaking of civil war: "But the general usage of nations regards such a war as entitling both the contending parties to *all the rights of war,* as against each other, and even as respects neutral nations." Page 688.

Civil war must be recognized by Congress before it can draw after it full belligerent rights.

"Before this insurrection against the established government can be dealt with on the footing *of a civil war,* within the meaning of the law of nations and the Constitution of the United States, and *which will draw after it belligerent rights,* it must be *recognized* or declared by the war-making power of the government. No power short of this can change the legal status of the government, or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties, growing out of a state of war. The war power of the government must be exercised before this changed condition of the government and people, and of neutral third parties, can be admitted. *There is no difference in this respect between a civil or a public war.*" Page 689.

* See Lawrence's note to Wheaton, p. 522, and authorities there cited.

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THE RIGHTS OF REBELS AS CITIZENS OF STATES, AND AS SUBJECTS OF THE UNITED STATES, ARE, ACCORDING TO THE CONSTITUTION, TO BE SETTLED BY THE LAWS OF WAR.

Such being the law of the land, as declared by the Supreme Court, in order to ascertain what are the legal or constitutional rights of public enemies, we have only

Civil war attaches to it all the consequences of belligerent rights, when once recognized by Congress.

"It must be a war in a legal sense (in the sense of the law of nations, and of the Constitution of the United States) *to attach to it all the consequences that belong to belligerent rights.* Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general government, the inquiry should be into the law of nations, and into the municipal and fundamental laws of the government. For we find there, that to constitute a civil war, in the sense in which we are speaking, before it can exist in contemplation of law, *it must be recognized* or declared by the sovereign power of the state; and which sovereign power, by our Constitution, is lodged in the Congress of the United States. Civil war, therefore, under our system of government, can exist *only by an act of Congress,* which requires the assent of two of the great departments of the government, the executive and the legislative." Page 690.

Civil war converts every citizen of the hostile state into a *public enemy.*

"The laws of war, *whether the war be civil* or *inter gentes,* as we have seen, convert every citizen of the hostile state into a public enemy, and treats him accordingly, whatever may have been his previous conduct."

Innocent persons cannot lawfully be punished, or their lands confiscated as enemies, until Congress has recognized a state of civil war.

"Congress alone can determine whether war exists or should be declared. *And until they have so acted,* no citizen of the state can be punished in his person or property unless he has committed some offence against a law of Congress, passed before the act was committed, which made it a crime and defined the punishment. Until then, the penalty of confiscation for the acts of others with which he had no concern, cannot lawfully be inflicted."

"By the Act of 16 Geo. III., 1776, all trade between the colonies and Great Britain was interdicted."

Congress did recognize civil war by Act of July 13, 1861

"From this time the war (of the revolution) became a *territorial, civil war* between the contending parties, *with all the rights of war known to the law of nations.*"

"The Act of Congress of July 13, 1861, we think *recog-*

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to refer to the settled principles of the belligerent law of nations or the laws of war.

Some of the laws of war are stated in both the Opinions in the case above mentioned. A state of foreign war instantly annuls the most solemn treaties between nations.* It terminates all obligations in the nature of

nized a state of civil war between the government and the Confederate States, and made it territorial." Page 695.

"We agree, therefore, that the Act of the 13th of July, 1861, recognized a state of civil war between the government and the people of the States described in that Proclamation (of August 16, 1861). Page 696.

"But this (the right of the President to recognize a state of civil war as existing between a foreign government and its colonies) is a very different question from *the one before us, which is*, whether the President can recognize or declare a civil war, *under the Constitution, with all its belligerent rights*, between his own government and a portion of its citizens in a state of insurrection. *That power*, as we have seen, *belongs to Congress. We agree* when *such a war is recognized*, or declared to exist by the war-making power, but not otherwise, it is the *duty of courts to follow the decision* of the *political* power of the government." Page 697.

Courts must follow the decision of the *political* powers.

"No civil war existed between this government and the States in insurrection till recognized by the Act of Congress of July 13, 1861. The President does not possess the power, under the Constitution, to declare war, or *recognize* its *existence* within *the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens* from a state of peace to a state of war. This power belongs exclusively to the Congress of the United States, and consequently the President had no power to set on foot a blockade under the law of nations, and the capture of the vessel and cargo in all the cases before, *in which the capture occurred before the 13th of July*, 1861, for breach of blockade, or as enemy's property, is illegal and void." Page 699.

Civil war did not exist until July 13, 1861, so as to carry with it all belligerent rights.

Mr. Chief Justice TANEY and Messrs. Justices CATRON and CLIFFORD concurred with Mr. Justice NELSON in the Dissenting Opinion.

* See 2 Twiss, 68, sect. 36.

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compacts or contracts, at the option of the party obligated thereby. It destroys all claims of one belligerent upon the other, except those which may be sanctioned by a treaty of peace. A civil territorial war has the same effect, excepting only that the sovereign may treat rebels as subjects or merely as belligerents. Hence civil war, in which the insurgents have become public or territorial enemies, instantly annuls all their rights or claims against the United States, under the constitution or laws, whether that constitution be called a compact, a treaty, or a covenant, and whether the parties to it were States, in their sovereign capacity, or the people of the United States, as individuals. Any other result would be as incomprehensible as it would be mischievous. A public enemy cannot lawfully claim the right of entering Congress and voting down the measures taken to subdue him.* Why not? Because, by becoming a public enemy, he has annulled and lost his rights in the government, and can never regain them except by our consent.†

STATE RIGHTS ARE UNDER OUR CONTROL.

If the inhabitants of a large part of the Union have, by becoming public enemies, surrendered and annulled their former rights, the question arises, Can they recover them? Such rights cannot be regained by reason of their having ceased to fight. The character of public enemies having once been stamped upon them by the laws of war, remains fixed until it shall have been, by our consent, removed. To stop fighting does

* By Joint Resolution No. 12 (February 18, 1865), Congress declared that the rebel States were not entitled to vote for electors of President and Vice-President of the United States. By the reconstruction acts Congress has placed them under military government, and has carried into full effect the rights above claimed.

† See Note on "Belligerents," p. 425.

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not make them cease to be public enemies, because they may have laid down their arms for want of powder, not for want of will. Peace does not restore the noble dead who have fallen a sacrifice to treason, nor does it revive the rights once extinguished by civil, territorial war. The land of the Union belongs to the people of the United States, subject to the rights of individual ownership. Each person inhabiting those sections of the country declared by the President's Proclamation to be in rebellion, has the right to what belongs to a public enemy, and no more. He can have no right to take any part in our government. That right does not belong to an enemy of the country while he is waging war, or after he has been subdued. A public enemy has a right to participate in, or to assume the government of the United States, only when he has conquered the United States. We find in this well-settled doctrine of belligerent law the solution of all questions in relation to State rights. After the inhabitants of a district have become public enemies, they have no rights, either State or National, as against the United States. They are belligerents only, and have retained only belligerent rights.

STATE RIGHTS ARE NOT APPURTENANT TO LAND.

Suppose that all the inhabitants living in South Carolina should be swept off, so that solitude should reign throughout its borders, unbroken by any living thing; would the State rights of South Carolina still exist as attached to the land itself? Can there be a sovereignty without a people, or a State without inhabitants? State rights, so far as they concern the Union, are the rights of persons, as members of a State, in relation to the general government; and when a person has become a public enemy, then he loses all rights except the

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rights of war. And when *all* the inhabitants have (by engaging in civil, territorial war) become public enemies, it is the same, in legal effect, as though the inhabitants had been annihilated. So far as this government is concerned, civil, territorial war obliterates from districts in rebellion all lines of States or counties; the only lines recognized by war are the lines which separate us from a public enemy.

FORFEITURE NOT CLAIMED—THE RIGHT OF SECESSION NOT ADMITTED, SINCE CITIZENS MAY BE DEEMED BELLIGERENTS AND SUBJECTS.

Do not place reliance upon the common law doctrine of forfeitures of franchises as applicable to this revolution, for forfeiture can be claimed only upon an admission of the validity of the act by which it has been effected. The belligerent law of civil, territorial war, whereby a public enemy loses his rights as a citizen, does not admit the right of secession. No mere vote or law of secession can make an individual a public enemy. A person may commit heinous offences against municipal law, he may commence hostilities against the government, without being a public enemy. To be a personal enemy, is not to be a public enemy to the country, in the eye of belligerent or international law. Whosoever engages in an insurrection is a personal enemy, but it is not until that insurrection has swelled into territorial war that he becomes a public enemy. It must also be remembered that the right of secession is not conceded by enforcement of belligerent law, since in civil war a nation has the right to treat its citizens either as subjects or belligerents, or as both. Hence, while belligerent law destroys all claims of

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subjects engaged in civil war, as against the parent government, it does not release them from their duties to that government. By war, they lose their rights, but do not avoid their obligations. The inhabitants of the conquered districts have abandoned their civil and political privileges, but cannot escape their liabilities. Whatever may be left to them besides the rights of war, will be that which we may choose to concede. It is for us to dictate to them, not for them to dictate to us, what immunities they shall enjoy.

THE PLEDGE OF THE COUNTRY TO ITS SOLDIERS, ITS CITIZENS, AND ITS SUBJECTS, MUST BE KEPT INVIOLATE.

Among the war measures sanctioned by the President, to which he has, more than once, pledged his sacred honor, and which Congress has enforced by solemn laws, is the liberation of slaves. The government has invited them to share the dangers, the honor, and the advantages of sustaining the Union, and has solemnly promised to secure their freedom. Whatever disasters may befall our arms, whatever humiliation may be in store for us, it is earnestly hoped that we may be saved the unfathomable infamy of breaking the nation's faith with Europe, and with our colored citizens and slaves. If the rebellious States shall be allowed to return to the Union with constitutions guaranteeing the perpetuity of slavery, and if their laws shall be again revived and put in force against free blacks and slaves, we shall at once invoke upon our country, in all its force and wickedness, that very curse which has brought on the war and its terrible train of sufferings. Slaveholders are now fighting for the per-

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petuity of slavery. Shall we hand over to them, at the end of the war, just what they have been fighting for? Shall all our blood and treasure be spilled uselessly upon the ground? Shall the country not protect itself against the evil which has caused all our woes? Will you breathe new life into the strangled serpent, which, without your aid, will perish?

If you concede State rights to your enemies, what security can you have that traitors will not pass State laws which will render the position of the blacks intolerable, *or reduce them all to slavery?*

Would it be honorable on the part of the United States to free these men, and then hand them over to the tender mercy of slave laws?

Will it be possible that local slave laws should exist and be enforced by slave States without overriding the rights guaranteed by the laws of the country to all men, irrespective of color?

Will you run the risk of these angry collisions of State and National laws while you have the remedy and antidote in your own hands?

PLAN OF RECONSTRUCTION RECOMMENDED.

One of two things should be done in order to keep faith with the country and save us from obvious peril. Allow the inhabitants of conquered territory to form themselves into States, only by adopting constitutions such as will forever remove all cause of collision with the United States, by excluding slavery therefrom, or continue military government over the conquered district, until there shall appear therein a sufficient number of loyal inhabitants to form a republican government,

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which, by guaranteeing freedom to all, shall be in accordance with the true spirit of the constitution of the United States. These safeguards of freedom are requisite to render permanent the domestic tranquillity of the country which the constitution itself was formed to secure, and which it is the legitimate object of this war to maintain.*

* *Note to Forty-third Edition.* — See page 57, note. See also the Freedman's Bureau acts, March 3, 1865; the reconstruction acts, March 2, 1867; the act for the admission of Arkansas to representation in Congress, June 22, 1868 (chap. 69); acts for admitting North and South Carolina, Louisiana, Georgia, Alabama, and Florida to representation in Congress, June 25, 1868 (chap. 70). See also Note on "Reconstruction," p. 427; the President's Messages, pp. 250–256, 400–405; Note on "Slavery," p. 393; "Slaves in the Army," p. 405; Note on "Belligerents," p. 425.

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EXTRACT FROM THE PRESIDENT'S MESSAGE.

EMANCIPATION AND ITS RESULTS.

WHEN Congress assembled a year ago, the war had already lasted nearly twenty months, and there had been many conflicts on both land and sea, with varying results.

The rebellion had been pressed back into reduced limits, yet the tone of public feeling at home and abroad was not satisfactory. With other signs, the popular election, then just past, indicated uneasiness among ourselves, which, amid much that was cold and menacing, the kindest words coming from Europe were uttered in accents of pity that we were too blind to surrender a hopeless cause.

Our commerce was suffering greatly by a few armed vessels, built upon and furnished from foreign shores, and were threatened with such additions from the same quarter as would sweep our trade from the sea and raise our blockade. We had failed to elicit from European governments any thing hopeful on this subject.

The preliminary Emancipation Proclamation, issued in September, was running its assigned period to the beginning of the new year. A month later the final proclamation came, including the announcement that colored men, of suitable condition, would be received in the war service.

The policy of emancipation and of employing black soldiers gave to the future a new aspect, about which hope, and fear, and doubt contended in uncertain conflict.

According to our political system, as a matter of civil administration, the general government had no lawful power to effect emancipation in any State, and for a long time it had been hoped that the rebellion could be suppressed without resorting to it as a military measure.

It was all the while deemed possible that the necessity for it might come, and that if it should, the crisis of the contest would then be presented. It came; and, as was anticipated, it was followed by dark and doubtful days.

Eleven months having now passed, we are permitted to take another review. The rebel borders are pressed still further back, and by the complete opening of the Mississippi, the country dominated by the rebellion is divided into distinct parts, with no practical communication between them. Tennessee and Arkansas have been cleared of insurgents, and influential citizens in each, owners of slaves, and advocates of slavery at the beginning of the rebellion, now declare openly for emancipation in their re-

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spective States; and of those States not included in the emancipation proclamation, Maryland and Missouri, neither of which, three years ago, would tolerate restraint upon the extension of slavery into territory, only dispute now as to the best mode of removing it within their own limits.

Of those who were slaves at the beginning of the rebellion, full one hundred thousand are now in the United States military service, about one half of which number actually bear arms in the ranks, thus giving the double advantage of taking so much labor from the insurgent cause, and supplying the places which otherwise must be filled with so many white men. So far as tested, it is difficult to say that they are not as good soldiers as any.

No servile insurrection or tendency to violence or cruelty has marked the measures of emancipation and arming the blacks.

These measures have been much discussed in foreign countries, and contemporary with such discussion the tone of public sentiment there is much improved. At home the same measures have been fully discussed, supported, criticised, and denounced, and the annual elections following are highly encouraging to those whose official duty it is to bear the country through this great trial. Thus we have the new reckoning. The crisis which threatened to divide the friends of the Union is past.

RECONSTRUCTION.

Looking now to the present and future, and with reference to a resumption of the national authority with the States wherein that authority has been suspended, I have thought fit to issue a Proclamation, a copy of which is herewith transmitted. On examination of this proclamation it will appear, as is believed, that nothing is attempted beyond what is amply justified by the Constitution; true, the form of an oath is given, but no man is coerced to take it. The man is only promised a pardon in case he voluntarily takes the oath.

The Constitution authorizes the executive to grant or withhold the pardon at his own absolute discretion, and this includes the power to grant on terms, as is fully established by judicial and other authorities; *it is also proposed that if in any of the States named a State government shall be, in the mode prescribed, set up, such governments shall be recognized and guaranteed by the United States, and that under it the State shall, on the constitutional conditions, be protected against invasion and domestic violence.*

The constitutional obligation of the United States to guarantee to every State in the Union a republican form of government, and to protect the State in the cases stated, is explicit and full.

But why tender the benefits of this provision only to a State government set up in this particular way? This section of the Constitution contemplates a case wherein the element within a State favorable to republican

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government in the Union may be too feeble for an opposite and hostile element external to or even within the State, and such are precisely the cases with which we are now dealing.

An attempt to guarantee and protect a revived State government, constructed in whole or in preponderating part from the very element against whose hostility and violence it is to be protected, is simply absurd.

There must be a test by which to separate the opposing elements so as to build only from the sound, and that test is a sufficiently liberal one which accepts as sound whoever will make a sworn recantation of his former unsoundness; but if it be proper to require as a test of admission to the political body an oath of allegiance to the Constitution of the United States and to the Union under it, *why not also to the laws and proclamations in regard to slavery?*

These laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect, there had to be a pledge for their maintenance. In my judgment, they have aided, and will further aid, the cause for which they were intended.

To now abandon them, would be not only to relinquish a lever of power, *but would also be a cruel and astounding breach of faith.* I may add at this point, that while I remain in my present position, *I shall not attempt to retract or modify* the *emancipation proclamation,* nor shall I return to *slavery any person who is free by the terms of that proclamation, or by any of the acts of Congress.*

For these and other reasons it is thought best that support of these measures shall be included in the oath, and it is believed that the Executive may lawfully claim it in return for pardon and restoration of forfeited rights, which he has clear constitutional power to withhold altogether, or grant upon the terms he shall deem wisest for the public interest.

It should be observed, also, that this part of the oath is subject to the modifying and abrogatory power of legislation and *Supreme Judicial decisions.**

The proposed acquiescence of the National Executive in any reasonable temporary State arrangement for the freed people, is made with the view of possibly modifying the confusion and destitution which must, at best, attend all classes by a total revolution of labor throughout whole States.

It is hoped that the already deeply afflicted people in those States may be somewhat more ready to give up the cause of their affliction, if to this extent this vital matter be left to themselves, while no power of the national executive to prevent an abuse is abridged by the proposition.

The suggestion in the proclamation as to maintaining the political framework of the States on what is called *reconstruction,* is made in the hope that it may do good without danger of harm; it will save labor and avoid great

* It must not be forgotten that on purely political questions the Supreme Court is bound to follow the decisions of the executive or legislative departments of government.

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confusion; but why any proclamation now upon this subject? This question is beset with the conflicting views that the step might be delayed too long or be taken too soon. In some States the elements for resumption seem ready for action, but remain inactive, apparently for want of a rallying point — a plan of action. Why shall A adopt the plan of B, rather than B that of A; and if A and B should agree, how can they know but that the general government here will reject their plan? By the Proclamation *a plan is presented,* which may be accepted by them as a rallying point, and which they are assured in advance will not be rejected here. This may bring them to act sooner than they otherwise would.

The objections to a premature presentation of a plan by the National Executive consists in the danger of committal on points which could be more safely left to further developments. Care has been taken to so shape the denouement as to avoid embarrassment from this source, saying that on certain terms certain classes will be pardoned with rights restored.

It is not said that other classes or other terms will never be included, saying that reconstruction will be accepted if presented in a specified way. It is not said it will never be accepted in any other way. The movements by State action for emancipation in several of the States not included in the Emancipation Proclamation, are matters of profound gratulation; and while I do not repeat in detail what I have heretofore so earnestly urged upon this subject, my general views remain unchanged, and I trust that Congress will omit no fair opportunity of aiding these important steps to the great consummation.

In the midst of other cares, however important, we must not lose sight of the fact that *the war power is still our main reliance.* To that power alone can we look yet for a time to give confidence to the people in the contested regions that the insurgent power will not again overrun them. Until that confidence shall be established, little can be done any where for what is called Reconstruction.

Hence our chiefest care must still be directed to the army and navy, who have thus far borne their harder part so nobly and well.

And it may be esteemed fortunate that, in giving the greatest efficiency to these indispensable arms, we do also recognize the gallant men, from commander to sentinel, who compose them, and to whom, more than to others, the world must stand indebted for the home of freedom, disenthralled, regenerated, enlarged, and perpetuated.

ABRAHAM LINCOLN.

December 8, 1863.

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PROCLAMATION OF AMNESTY BY THE PRESIDENT.

THE following Proclamation is appended to the Message: —

PROCLAMATION.

Whereas, in and by the Constitution of the United States, it is provided that the President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment; and whereas, a rebellion now exists whereby the *loyal State governments* of several States *have for a long time been subverted*, and many persons have committed, and are now guilty of treason, against the United States; and whereas, with reference to said rebellion and treason, laws have been enacted by Congress declaring forfeitures and confiscation of property and liberation of slaves, all upon conditions and terms therein stated, and also declaring that the President was thereby authorized, at any time thereafter, by proclamation, to extend to persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions, and at such times, and on such conditions, as he may deem expedient for the public welfare; and,

Whereas, the congressional declaration for limited and conditional pardon accords with well-established judicial exposition of the pardoning power; and whereas, with reference to said rebellion, the President of the United States has issued several proclamations with provisions in regard to the liberation of slaves; and whereas, it is now desired by some persons heretofore engaged in said rebellion *to resume their allegiance to the United States*, and to *re-inaugurate loyal State governments* within and for their respective States,

Therefore, I, Abraham Lincoln, President of the United States, do proclaim, declare, and make known to all persons who have directly or by implication participated in the existing rebellion, except as hereinafter excepted, that a full pardon is granted to them and each of them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain said oath inviolate, and which oath shall be registered for permanent preservation, and shall be of the tenor and effect following, to wit:

I, ——, do solemnly swear, in presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the

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United States and the Union of the States thereunder, and that I will, in like manner, abide by and faithfully support *all acts of Congress* passed during the existing rebellion *with reference to slaves*, so long and so far as not repealed, or modified, or held void by Congress, or by decree of the Supreme Court, and that I will in like manner *abide by and faithfully support all proclamations of the President*, made during the existing rebellion, *having reference to slaves*, so long and so far as not modified or declared void by the Supreme Court. So help me God.

The persons excepted from the benefits of the foregoing provisions are all who are or shall have been civil or diplomatic officers, or agents of the so-called Confederate Government; all who have left judicial stations under the United States to aid rebellion; all who are or shall have been military or naval officers of said so-called Confederate Government above the rank of colonel in the army and of lieutenant in the navy, and all who left seats in the United States Congress to aid the rebellion.

All who resigned commissions in the army or navy of the United States and afterwards aided the rebellion, and all who have engaged in any way maltreating colored persons, or white persons in charge of such, otherwise than lawfully as prisoners of war, and which persons may have been found in the United States service as soldiers, seamen, or in any other capacity.

And I do further proclaim, declare, and make known, that, *whenever*, in any of the States of Arkansas, Texas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Florida, South Carolina, and North Carolina, *a number of persons*, not less than one tenth in number of the votes cast in such States at the Presidential election of the year of our Lord one thousand eight hundred and sixty, having taken the oath aforesaid, and not having since violated it, and being qualified a voter by the election law of the State existing immediately before the so-called act of secession, and excluding all others, *shall reëstablish a State government which shall be republican, and in no wise contravening said oath, such shall be recognized as the true government of the State, and the State shall receive these under the benefit of the constitutional provision, which declares that the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, on application of the legislature, or the executive*, where the legislature cannot be convened, *and against domestic violence;* and I do further proclaim, declare, and make known, that any provisions which may be adopted by such State government in relation to the freed people of such States which shall recognize and declare their permanent freedom, provide for their education, and which may yet be consistent, as temporary arrangement, with their present condition as a laboring, landless, and homeless class, will not be objected to by the National Executive.

And it *is suggested, as not improper, that in constructing a loyal State government in a State, the name of the State, the boundary, the subdivisions, the constitution, and the general code of laws, as before the*

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rebellion, be maintained, subject only to the *modifications* made necessary by the *conditions hereinbefore stated,* and such others, if any, not contravening said conditions, and which may be deemed expedient by those framing the new State government.

To avoid misunderstanding, it may be proper to say that this proclamation, so far as it relates to State governments, has no reference to States wherein loyal State governments have all the while been maintained.

As for the same reason it may be proper further to say, that *whether members sent to Congress from any State shall be admitted to seats, constitutionally rests exclusively with the respective Houses, and not to any extent with the Executive;* and still further, that this proclamation is intended to present the people of the States wherein the national authority has been suspended and loyal State governments have been subverted, *a mode in and by which the national authority and loyal State governments may be established within such States, or in any of them;* and while the mode presented is the best the Executive can suggest, with his present impressions, it must not be understood that no other possible mode would be acceptable.

Given under my hand at the City of Washington, the eighth day of December, A. D. one thousand eight hundred and sixty three, and of the Independence of the United States of America the eighty-eighth.

ABRAHAM LINCOLN.

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MILITARY GOVERNMENT

OF

HOSTILE TERRITORY

IN TIME OF WAR.

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PREFACE TO MILITARY GOVERNMENT.

THE following pages on "Military Government of Hostile Territory in Time of War," were written early in 1864, in answer to a letter of the Hon. J. M. Ashley, M. C., of Ohio, to the Secretary of War (dated December 24, 1863), which enclosed the draft of a bill for a military provisional government over insurrectionary States, proposed by Mr. Ashley for consideration by the "Special Committee of the House on the Rebellious States." In that letter he requested the Secretary "to make any suggestions he might have to make," or, "if he had not time to make any, to submit the bill to the Solicitor of the War Department for his opinion." This communication, with the proposed bill, were accordingly referred, as requested, by the Secretary of War.

The subjects discussed are of great and growing importance. Clear and just views of the rights, powers and obligations of the Government are necessary to a wise and consistent administration of affairs in the insurrectionary districts, during their transition from open hostilities to their former relations to the Union. A careful regard, in the beginning, to the proper limitations of authority in the respective departments of this government, will be necessary in order to avoid embarrassment and confusion in the end; and a just appreciation of the war powers of the President will tend to relieve patriotic citizens from apprehension, even if Congress should, for the present, omit further legislation on these subjects.

The following chapters are only a development of the principles stated in the "WAR POWERS."

W. W.

WASHINGTON, D. C., March 24, 1864.

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MILITARY GOVERNMENT.*

CHAPTER I.

WAR—ITS MEANS AND RESULTS.

A JUST civil war may, by the law of nations, be rightfully continued until the purposes for which it was begun shall have been accomplished. The overthrow and destruction of insurgent armies, and the occupation of hostile territory by military force, are but preliminary measures, which should lead to the complete reëstablishment of lawful government on foundations strong enough to insure its continued supremacy. To attain that result, order must be preserved, and domestic tranquillity must be maintained, after active hostilities shall have ceased; and means must be devised for restraining lawless aggressions in hostile districts, and for securing non-combatant citizens in the enjoyment of civil rights; otherwise, the country would be plunged into anarchy; successful campaigns would result only in waste of blood; conquest, however costly, could not be made permanent or secure, and legitimate government could not be successfully restored.

SOME FORM OF GOVERNMENT IS NECESSARY TO SECURE A CONQUEST.

Though military power must be used to secure the possession of that which has been acquired by arms, yet it is difficult, by aid of any moderate num-

* *Note to Forty-third Edition.*—See Note on "Military Government and Reconstruction," p. 427. Since the issue of the tenth edition Congress has passed the Freedman's Bureau act (1865), the act for the military government of the rebel States (1867), and the acts of April 10, 1869 (chaps. 17 and 18). The Supreme Court has decided the case of *Georgia* v. *Stanton*, 6 Wallace, 63 (1868–69). See Appendix, p. 588.

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ber of troops, to guard and oversee an extended territory; and it is practically impossible for any army to hold and occupy all sections of it at the same moment. Therefore, if its inhabitants are permitted to remain in their domiciles unmolested, some mode must be adopted of controlling their movements, and of preventing the commission of acts of hostility against their conquerors or of violence against each other. Stragglers from our army must be protected from murder, commissaries' supplies must be guarded from capture by guerrillas, and non-combatants must be secured in their social rights, and punished for their crimes. The total disorganization produced by civil war requires, more even than that produced by foreign war, the restraints of martial law. In countries torn by intestine commotions, neighbors become enemies; murders, robberies, destruction of property, and all forms of lawless violence are common, and, in the absence of military rule, would go unpunished. Hence, to secure the firm and peaceful possession of a conquered province, some form of government must be established, which shall have power to control its inhabitants, and to prevent them from committing crimes.

Since war destroys or suspends municipal laws in the country where hostilities are carried on, no government is left there but such as is derived from the laws of war. All crimes must be restrained or punished by belligerent law, or go unwhipped of justice. Hence every case of wrong must be dealt with by *force of arms*, or must be disposed of by tribunals acting under sanction and authority of military power.*

* See Notes to Forty-third Edition, on "Military Government," p. 427; Address of Chief Justice Chase, June 6, 1867 (Appendix, p. 596); *Ex parte Milligan*, p. 560; Note on p. 436; the cases of *The Venice*, *Mrs. Alexander's Cotton*, *The Peterhoff*, *The William Bagaley*, and other cases in the Appendix.

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WHY GOVERNMENT IS ESSENTIAL TO THE SECURITY OF A CONQUEST.

The necessity of provisional or temporary government will become apparent by observing the condition of a people who have been overpowered by arms.

Suppose, by way of illustration, that in one of the border slave States, in time of profound peace, by some sudden and unforeseen catastrophe all the officers of civil government were to perish; that the judges, sheriffs, juries and all courts of justice were to withdraw from that region; that the jails and penitentiaries were to be set open and the escaped criminals were to reappear amid the scenes of their former crimes; that the officers of the United States had fled; that all public property had been seized by violence and appropriated to private uses; that all restraints of law or of force were taken from wicked and unprincipled men; that "might made right"; that debts could not be collected; that obligations the most solemn could not be enforced; that men and women could be shot, hung, or murdered in cold blood, if they differed in opinion on any question of religion, of politics, or of settlement of accounts; that private malice could be gratified by the midnight burning of a neighbor's house, and that injuries too foul and too horrible to mention could be perpetrated without means of redress; that all the laws of civilized society and the most sacred rights of humanity could be violated every hour of the day or night, with no protection for the innocent, no punishment for the guilty.

Such a state of things would *inevitably result in civil war*. Clans and associations would be formed; the whole people would sleep on their arms; revenge would inflame them; havoc and slaughter would be widespread; burning villages and smoking towns, devastated

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lands and general ruin would demonstrate to all observers that order is essential to the social existence of a community, and that peace can be maintained only by some government of laws.

As the absence of government in time of peace would be followed by such calamitous results, how could they be avoided or escaped by a people already engaged in civil broils, if unprotected by military force, or military administration? In the rebellious States now occupied by our armies, we find a population split into factions, part slave, part free; traitors fighting against loyal men; non-combatants hostile to friends of our government; officers attempting to collect the revenue and to enforce the blockade by bloody encounters with smugglers and freebooters; banditti and guerillas with their secret allies, murdering in cold blood our sick or wounded soldiers; robbers, plunderers, cutthroats, incendiaries, and assassins wreaking their inhuman passions even upon defenceless women and children. Never was there a society, whose shattered and revolutionary condition more imperiously required a firm and powerful provisional government, to be established directly after the cessation of active hostilities. To lose control of conquered territory, by withdrawing our armies and by neglecting to organize provisional government over it, would be to throw away all that has been gained by war, and basely to violate an obligation under the laws of war to the people who have been coerced into submission to our power.

MILITARY GOVERNMENT A MILD FORM OF HOSTILITIES — A CONCESSION — ITS TENDENCY.

The maintenance of a provisional military government is an economical mode of continuing hostilities

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against a subjugated people, by dispensing with the unnecessary use of force.

To grant a government of any kind to a conquered people, while engaged in active hostilities, is a concession, a boon, a benefit, not an unjustifiable assumption of rights. The law of war justifies the use of *brute force* as the means of governing a public enemy. The judges under that law are military officers and sometimes common soldiers, without aid of law-books, counsellors, juries, codes, statutes, or regulations other than their own *will.* From their decrees there is no appeal; judge, jury, and executioner too often stand embodied in a single individual at the but-end of a Sharp's rifle.

In the civil war brought upon southern rebels by their own choice, to permit them to be governed by rules, regulations, statutes, laws, and codes of jurisprudence; to give them *jurists* able and willing to abide by standing laws, and thus to restore (as far as is consistent with public safety and the secure tenure of conquest) the blessings of civil liberty and a just administration of laws — most of which are made by those on whom they are administered — is an act of magnanimity worthy of a great people.

Such a government, though founded on and administered by military power, surely tends to restore the confidence of the disloyal by giving them rights they could not otherwise enjoy, and by protecting them from unnecessary hardships and wrongs. It cannot fail to encourage and support the friends of the Union in disloyal districts, by demonstrating to all, the forbearance and justice of those who are responsible for the conduct of the war.

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THERE MUST BE A MILITARY GOVERNMENT OR NO GOVERNMENT.

When the country can no longer be governed by the magistrate, it must be handed over to the soldier. When law becomes powerless, force must be applied. When civil tribunals fall, military tribunals must rise. Foreign territory, whether acquired through conquest or treaty, does not, by force of the Constitution, become entitled to self-government,* nor does the conquest of public enemies within the domain of the United States confer upon them the right of self-government; for the military control of the conqueror is alone supreme in hostile regions. There being in the belligerent district in the South no power or authority of the enemy which can be recognized as legitimate by the United States, our military power must be the basis on which our control over the affairs of persons living there must finally rest. By conquest, the local government and the courts of justice are deprived of their power, because the former is hostile, and the latter derive their authority from a public enemy. The only provisional government which can be practically organized, while war lasts, is that which is established by military power, and by the right of conquest.† No local tribunal, in a conquered district, civil, judicial, political, or military, has any authority, unless recognized as lawful by the conqueror.‡ But as he is clothed

* 3 Story, Comm. 1318. *Am. Ins. Co.* v. *Canter*, 1 Peters, 511, 542, 516.

† See Notes to Forty-third Edition, on "Military Government" and "Reconstruction."

‡ By the act of July 17, 1862, it is made the duty of the President to seize the estate, etc., of all persons acting thereafter as governors of States, members of legislatures, or of conventions, or judges of courts, of the so-called Confederate States, and of any person holding any office under either of the said States. Such persons cannot, therefore, be recognized by our government otherwise than as criminals.

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only with military authority, he can establish no government other than one of a military character. Therefore, if he finds it expedient to administer civil or municipal codes of law, he should adopt and apply them as military law, following therein, as far as practicable, the rules and forms of civil jurisprudence.

THE RIGHT TO ERECT MILITARY GOVERNMENTS IS AN ESSENTIAL PART OF THE WAR-POWER, AND IS FOUNDED IN NECESSITY AND SANCTIONED BY AUTHORITY.

It has been shown that justifiable war ought to be prosecuted until the object for which it was commenced has been attained. Our object is the restoration of the authority of the United States over all the territory and inhabitants thereof, a result which can be accomplished with the least injury to ourselves and to our enemies by substituting, as far as safety will permit, a temporary government over them by military law, instead of continuing the use of mere force.

Reason and experience alike demonstrate the necessity of that mode of regulating a hostile community while passing through the intermediate state from open and general warfare to the reëstablishment of peaceful institutions. No government other than that authorized by the law of war is practically useful, or can be sustained, until peace is so far restored that the enemy will voluntarily submit to the laws of Congress.

The right to exercise control by armed force in time of war over hostile regions is a necessary part of the power of making and prosecuting war. If the people of a belligerent locality can be lawfully captured and held as prisoners of war, and can thus be subjected to the orders of a commanding officer, it would be unrea-

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sonable to suppose that the same captives could not be held subject to the same orders, if permitted to go at large within the limits in which the military power of that officer was and still is supreme.

Absolute necessity is the foundation and justification on which the right to enforce military government rests. That right has been used or practically acknowledged by most of the modern civilized nations. It is a right founded on reason, indispensable in practice, and is sanctioned by the authority of writers on international law, by jurists in Europe, and by the Supreme Court of the United States.*

* Wheaton, Law of Nations (Lawrence's edition), 99.
Halleck, International Law, 778.
Fleming v. *Page*, 9 How. 615 (Appendix, p. 512).
Cross v. *Harrison*, 16 How. 189 (Appendix, p. 516).
Leitensdorfer v. *Webb*, 20 How. 177 (Appendix, p. 522).
Am. Ins. Co. v. *Canter*, 1 Peters, S. C. R. 542.
U. S. v. *Gratiot*, 14 Peters, S. C. R. 526.
Also, see cases in the Appendix.

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CHAPTER II.

THE CONSTITUTION AUTHORIZES THE PRESIDENT TO ESTABLISH MILITARY GOVERNMENTS.

Whenever the President is called on to repel invasion or to suppress rebellion by force, if the employment of military government is a useful and proper means of accomplishing that object, the Constitution confers on him the power to institute such government for that purpose.

The power of the President to establish military governments is derived from the Constitution, Art. II., Sec. 1, Cl. 1, and is a legitimate exercise of his authority as Commander-in-Chief.

Art. IV., Sec. 4, also provides that, "The United States shall guaranty to every State in this Union a republican form of government; and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

A condition of public affairs like that now existing in certain rebellious States, renders military government thereof indispensably necessary to enable the United States to perform this guaranty of the Constitution. The authority, therefore, to institute such a government for that purpose, belongs to the President, because he is bound to see the laws enforced; and also, under Art. I., Sec. 8, Cl. 18, to Congress, because it is bound to pass all laws necessary and proper to enable the President to execute his duties.

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The topics now under consideration do not require any examination of the nature or extent of the right or duty of Congress, or of the President as an *executive* officer, to carry the Art. IV., Sec. 4, into effect. The erection and maintenance for a time, by executive authority, of a provisional government in any State or Territory as a "necessary and proper means" of carrying the guaranties of the Constitution into effect, may be the subject of explanation in a future essay.

The right of Congress is beyond question to establish temporary territorial or provisional governments over those parts of the country which, having been engaged in civil war against the United States, have by force of arms been coerced into submission to our government.*

It is not necessary in this place to make further explanations of Articles I. and IV., it being sufficient for our present purpose to refer to the powers conferred by the second Article.

The Constitution, Article II., Sec. 2, Cl. 1, provides that, "The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual service of the United States."

This clause by necessary implication, confers upon the Commander-in-Chief of the Army and Navy, the right in time of war to subject public enemies to military government and regulation. No limits to the power of the President, acting as a military commander, are prescribed in the Constitution. The laws of war, by which alone his operations should be regulated, establish his right to erect such government, and to maintain it by force of arms. The war powers of the

* See *post*, Chap. VI.

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President are interpreted and controlled only by the rules of belligerent law.* As authority to call into active service the army and navy, to capture or kill our enemies in battle, to seize and destroy their property, and to take and hold their lands by force, has been confided to the President without limitation, by deliberate acts of legislation, would it not seem inconsistent to withhold from him the right to keep what he has acquired by arms, and to hold in his control, while war lasts, those whom it was his duty to overthrow?

If it be said that the power thus claimed is not granted to the President *in express terms*, it may with equal correctness be said that the authority to carry on war, to suppress insurrections or to repel invasions, or to make captures on land or sea, is not conferred upon him in express terms. The Constitution enables the President to use war powers in no other way than by authorizing him under certain circumstances to call into service and to take command of the Army and Navy. But Congress is empowered to provide for raising and maintaining armies, and to make rules for captures on land and sea. Hence no one can doubt that when an army is raised, and captures are to be made, the President, being placed in command, has the right to employ these forces so as to accomplish the purpose for which they were organized, and therefore has the right to capture public enemies in arms as unquestionably as

* See cases subsequently cited: —

Fleming v. *Page*, 9 How. 615 (Appendix, p. 512).
Cross v. *Harrison*, 16 How. 189 (Appendix, p. 516).
Leitensdorfer v. *Webb*, 20 How. 177 (Appendix, p. 522).
Wheaton, 99.

See also "War Powers," p. 54.

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if that right had been conferred on him in plain words by the Constitution.

There can be no reason to doubt that the army is placed under the supreme command of the Chief Magistrate for all purposes for which offensive or defensive war may be justly waged. If he has authority to commit any act of hostility for the suppression of rebellion or the repelling of invasion, he has a right to commit all acts of hostility which may in his judgment be required to secure success in his military operations; and he has, therefore, the same right to erect a military government in hostile territory, under circumstances justifying it, as to perform any other military act. The erection of such government over the territory and persons of a public enemy in time of war, is an act of war; it is, in fact, continuing against them a species of hostility without the use of unnecessary force. It is a mode of retaining a conquest, of continuing custody and supervision over an unfriendly population, and of subjecting malcontent non-combatants to the will of a superior force so as to prevent them from engaging in hostilities or inciting insurrections or breaches of the peace, and from giving aid and comfort to the enemy. Large numbers of persons may thus be held in subjection to the moral and physical force of comparatively few military men. Contributions may be levied, property may be confiscated, commerce may be restrained or forbidden, and an unfriendly population may be held in subjection by military government, for the same reasons which would justify the repression of their open hostilities by force of arms. If the Constitution allows the President to go to war and to conquer the public enemy, the greater power must include the less; the

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power to make a conquest must include the authority to keep and maintain possession of it, while war continues.

No one would doubt our right to occupy a hostile district of country by military posts, or by soldiers stationed in commanding positions, or to enforce upon all its inhabitants the rigid rules of martial law.

How then can the right be questioned to hold the same territory by a *small* number of soldiers, administering the same law, under the same authority, whether these military men be called by their ordinary titles, or be styled provost marshals or military governors?

If the humanity of the conqueror allows the rigid rules of martial law to be relaxed, and permits the forms of local jurisprudence to be continued under the same authority, so far as it may be done consistently with the security of the conquest, on what principle can his right to do so be denied?

DUTY OF THE CONQUEROR TO GOVERN THOSE WHOM HE HAS SUBJUGATED.

In view of the necessity of securing the ends for which war is waged, and the consequences following from the absence of government over conquered territory, it is undoubtedly the right and duty of the conqueror to erect and maintain, during war, *a provisional military government* over districts which have been subjected to his power.

This right is recognized and confirmed by the acknowledged laws of war, and by the decisions of the Supreme Court of the United States; the propriety and necessity of its enforcement have been shown by our experience in New Mexico and California, and in the States now in rebellion.

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CHAPTER III.

DISTRIBUTION OF POWERS UNDER MILITARY GOVERNMENT.

Military governments control and regulate a great variety of public, private, civil, criminal, judicial, legislative and military affairs. Their powers may be concentrated in a single officer, acting as a military governor, or they may be distributed among several persons acting under authority of the Commander-in-Chief, who may appoint one as commander, another as governor, a third as chief justice, and others as collectors of customs, in the same department.

Among the various modes of instituting military governments, one is by a proclamation of martial law and by authorizing or appointing courts martial, courts of inquiry and military commissions to carry that law into execution over belligerent districts. These institutions are best adapted to localities whose inhabitants are too hostile to admit of milder forms of administration.

The character of the laws, and the organization of the tribunals now *authorized by the statutes* to administer such government, will next be considered.

DIFFERENT KINDS OF LAW OF WAR.

Martial Law consists of a system of rules and principles regulating or modifying the rights, liabilities, and duties, the social, municipal, and international relations in time of war, of all persons, whether neutral or belligerent.*

Military law is that part of the martial law of the

* See "Military Arrests," p. 166.

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land designed for the government of those who are engaged in the military service.

Of the rules and principles of martial law, many have not as yet been reduced to the form of statutes or regulations, although they are familiar to practitioners in courts martial. The 69th Article of War refers to and adopts them as part of the martial law. They may be styled the "*lex non scripta*," the custom of war, the *common law of the army*.

In the United States, martial law is modified by military laws made by Congress as articles of war, by general regulations for the government of the army, by all statutes on military subjects which the Constitution empowers Congress to pass, and by all lawful orders of the President, as Commander-in-Chief, and of the Secretary of War, or officers acting under them.

Martial law thus modified, is, when in force under the Constitution, administered within or without the United States by various *military tribunals*, including courts martial, military commissions, and courts of inquiry.*

MILITARY TRIBUNALS — HOW AUTHORIZED — THEIR CHARACTERISTICS.

The war courts now established by statutes and recognized by judicial decisions are called *courts martial*, *courts of inquiry*, and *military commissions*.†

The Constitution, Art. I., Sect. 8, Clause 14, gives Congress power "to make rules for the government and regulation of the land and naval forces."

* See Benet on Military Law and Courts Martial, 11; Dehart on Military Law and Courts Martial, 3.

† See Note to Forty-third edition, p. 460, on "Military Commissions as regarded by the Supreme Court and in Congress," and on the case of *Ex parte Milligan*, in the Appendix.

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The 16th clause declares that Congress shall have power to "provide for organizing, arming, and disciplining the militia; and for governing such part of them as may be employed in the service of the United States."

To provide for disciplining and governing militia in the service, means *to make laws, rules, or regulations* for their discipline and government. The power to make them would be inoperative, unless means could be employed to administer them. Congress, therefore, has power to provide *means* as well as rules for governing. No uncertainty is left upon this question; for the 18th clause of the same section gives Congress power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

In the execution of this authority, Congress has provided for governing the army by erecting military courts, which are not merely necessary and proper, but are the only practical means yet found for carrying into execution the rules and regulations so enacted. Such courts are therefore sanctioned as positively as if established by express language in the Constitution.

POWER OF THE PRESIDENT TO ESTABLISH COURTS OF WAR.

Not only has Congress power to create tribunals to administer "rules and regulations for governing the army and the navy," but there exists another independent power to create and establish courts with jurisdiction over a wider range of subjects and of persons. That power is vested by the Constitution in the President, as Commander-in-Chief of the army and navy,

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when in actual service in time of war, and is a branch of the power to erect and maintain military governments.

Military courts are a usual and essential part of the machinery of military government; the right to institute the one necessarily implies the right to organize the other. Courts martial have jurisdiction over offences not declared punishable by any law of Congress, and persons out of the reach of any but military process.

How far it may be within the province of Congress to control the operations of war courts instituted by the President, need not be here discussed.

As has been said, one class of courts of war may be instituted by laws of Congress, and another class may be created by the President. Both are under his control as military chief of the forces, while at the same time he is bound to execute the laws of the land. The right of the Commander-in-Chief, as well as that of Congress, to create military tribunals, has been sanctioned by many decisions of the Supreme Court of the United States.*

DO COURTS OF WAR EXERCISE JUDICIAL POWER?

As the proceedings of war courts in some respects resemble those of courts of law, it has been questioned whether they exercise any part of the judicial power of the United States which is vested by the Constitution (Art. III., Sect. 1) in "one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." It has been decided by the Supreme Court of the United States, that military tribunals exercise no part

* See authorities in the Appendix.

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of the *judicial* power, but only a portion of the military power of the Executive. And it has also been determined that the sentences or other lawful proceedings of courts martial of the United States are not the subject of appeal or revision in any judicial courts of the States or of the United States.*

WOULD JUDICIAL COURTS BE USEFUL AS WAR COURTS?

If it be said that judicial courts ought to employed for the administration of the laws of war, in order thereby to preserve the safeguards of civil liberty, the answer is that the whole system of judicial courts would be worse than useless in armies moving from place to place. Their organization is incompatible with the administration of military rights and remedies, by reason of local jurisdiction, jury trials, territorial limitations of process, and slowness of procedure, to say nothing of the inexperience of learned jurists in military affairs.

* *Vallandigham's Case* (Appendix, 524); *Dynes* v. *Hoover*, 20 How. 81, 82 (Appendix, 520).

See Notes to Forty-third Edition. Opinion delivered by Mr. Justice Davis in *Ex parte Milligan*; and remarks on this decision, Appendix, 460, 536.

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CHAPTER IV.

DIFFERENT KINDS OF MILITARY TRIBUNALS.

I. COURTS MARTIAL.

Courts martial have been recognized or established by express laws of Congress.

The Act of February 28, 1795, provided for calling out the militia and also for the organization of courts martial, designating the officers of whom they should be composed, and prescribing punishments by these tribunals for persons who should fail (in the instances specified in Sect. 5) to obey the orders of the President. These courts derived their authority not from any State law, but only from the statutes of the United States.*

It is, however, not questioned that either of the States may pass laws providing for the trial of such delinquents by State courts martial.†

The act of April 10, 1806, enacts articles of war, regulates (Article 64) the mode of organizing *general courts martial;* gives (Art. 65) the power of appointing them to general officers commanding an army, or colonels commanding a separate department, and institutes inferior courts martial (Art. 66); limits and requires confirmation of sentences (Arts. 65, 67), and

* *Commonwealth* v. *Irish*, 3 S. & R. 176.
S. C. 5 Hall's Law Jour. 476.
Meade v. *Dep. Marsh. Va. Dist.* 5 Hall L. J. 536.

† *Houston* v. *Moore*, 3 S. & R. 169.
Martin v. *Mott*, 12 Wh. R. 19.

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provides (Art. 69) for the appointment of prosecuting officers usually called Judge Advocates. This act regulates the oaths of officers composing the court; the oath of the Judge Advocate, the punishment of the accused for standing mute; it provides for challenges, punishes misbehavior in court, contempts, or unbecoming conduct of persons convicted; it lays down rules relating to testimony and to oaths and depositions of witnesses, and designates (Sect. 99) such crimes or misconduct as are punishable by courts martial.

The Act of Aug. 5, 1861, gives power to commanders of divisions or separate brigades to appoint general courts martial in time of war.

The decisions of these tribunals are required to be reported to, and to be reviewed by, some superior officer who may confirm, modify, or set them aside. But the final judgments of courts martial are not liable to be reviewed or reversed by any *judicial* court of the United States.*

When a court martial has once acquired jurisdiction of the person and the subject-matter, that jurisdiction is exclusive of civil courts for that offence. But the same transaction may constitute an offence against municipal as well as military law, and, in such cases, the offender is sometimes liable to punishment by both.

II. MILITARY COURTS OF INQUIRY.

The Act of April 10, 1806, regulates the manner of constituting such courts, their powers and proceedings. It recognizes the right of organizing them by the gen-

* *Dynes* v. *Hoover*, 20 How. 79 (Appendix, p. 520). *Vallandigham's Case*, Appendix, p. 524.

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erals or commanding officers; power is conferred upon these courts to summon, examine, and compel attendance of witnesses; the right of the accused to cross-examine witnesses is secured; and the mode of authenticating proceedings is prescribed.

But courts of inquiry being liable to abuse, are prohibited in all cases, except when demanded by the accused, or ordered by the President of the United States.

The Act of March 3, 1863, Sect. 25, gives power to every Judge Advocate of a court of inquiry to issue process to compel the attendance of witnesses, like that which State, Territorial, or District Courts issue in places where said court of inquiry is held.

These and other statutes show that this class of military courts is fully recognized by the laws of the United States.

III. MILITARY COMMISSIONS, INSTITUTED BY THE COMMANDER-IN-CHIEF, OR UNDER STATUTES.

Military commissions were first made familiar to the people of this country by General Orders No. 287, issued by General Scott at the head-quarters of the army in the National Palace of Mexico, Sept. 17, 1847.

During the occupation of Mexico by our army many crimes were committed by hostile individuals against soldiers, and by soldiers against the Mexicans, not punishable by courts martial as organized under the Articles of War. As General Scott wrote in his order, "A supplemental code is absolutely needed. That *unwritten* code is martial law, as an addition to the *written* military code prescribed by Congress in the Rules and Articles of War, and which unwritten code all armies in hostile countries are forced to adopt, not only for their own

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safety, but for the protection of the unoffending inhabitants and their property about the theatres of military operations, against injuries on the part of the army, contrary to the laws of war. . . . For this purpose it is ordered that all offenders in the matters aforesaid shall be promptly seized, confined, and reported for trial before military commissions to be duly appointed." These commissions were appointed, governed, and limited, as nearly as practicable, in the same manner as had been prescribed for the organization of courts martial; their proceedings to be recorded, reviewed, revised, disapproved, or confirmed, and their sentences executed, in nearly the same way as in the cases of the proceedings and sentences of courts martial, "provided that no military commission shall try any case clearly cognizable by any court martial, and provided also that no sentence of a military commission shall be put in execution against any individual belonging to this army, which may not be according to the nature and degree of the offence, as established by evidence, in conformity with known punishments in like cases in some one of the States of the United States of America."

"The administration of justice, both in civil and criminal matters, through the ordinary courts of the country," was "nowhere and in no degree to be interrupted by any officer or soldier, except" in certain specified cases. Martial, military, and civil or municipal law were administered in Mexico by General Scott, under such military commissions, in all the cases above stated. Courts of this description were instituted, not under the authority of Congress, but by the general war power of the Commander-in-Chief, a power which was fully confirmed and established by the Supreme Court of the United States. Congress has, however, recognized in express terms "military commissions," in the act of March 5,

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1863, Chap. 75; and having authorized the appointment of a Judge Advocate General, required all proceedings of such commissions to be returned to him for revision and record. This Act, Section 30, gives military commissions, equally with courts, martial jurisdiction in time of war, in cases of "murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny, when committed by persons who are in the military service of the United States, and subject to the articles of war."

Spies are also, by the same Act, Section 38, punishable with death by sentence of a military commission.*

The several statutes above cited show that Congress, in pursuance of its powers under the Constitution, has recognized and established courts martial, courts of inquiry, and military commissions.

Courts of the same denomination, but exercising a much broader jurisdiction of persons and subjects, have been organized and established by the President of the United States, under the war powers delegated to him by the Constitution, as Commander-in-Chief of the army and navy; and the binding authority of such courts has been admitted and solemnly asserted by the Supreme Court of the United States. Tribunals instituted by the war power of the President are those through which it is most usual to apply the laws of war in enemy's country, while hostilities are in progress, and for a certain length of time after a declaration of peace.

All these tribunals constitute usual and necessary parts of the machinery of warfare, and are the essential instruments of that military government by which alone the permanency of conquest can be secured.

* See act of July 22, 1861, sect. 10.

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IV. COURTS OF CIVIL JURISDICTION UNDER MILITARY AUTHORITY.

In the preceding pages it has been shown that the right of the President, as Commander-in-Chief of the army, to organize and administer government in all its branches by military power, in time of war, over belligerent districts of country recovered from a public enemy, and his right to subdivide and delegate those powers to different persons acting under his orders, are sanctioned by the Constitution and laws of Congress, by the decisions of the Supreme Court, and by our practice in former wars.

The same rights have been exercised during the present civil war. President Lincoln has appointed as Governor of the State of Louisiana, Brigadier-General Geo. F. Shepley; as Judge of the Provisional Court of the same State, Hon. Charles A. Peabody;* as Military Commander of the department containing Louisiana, Maj.-Gen. B. F. Butler; and General Butler has appointed to act under him a Sequestration Committee.†

The commissions and orders under which they have acted are as follows: —

COMMISSION AS MILITARY GOVERNOR.

WAR DEPARTMENT, WASHINGTON CITY, June 3, 1862.

HON. GEORGE F. SHEPLEY, &c. &c.

SIR: — You are hereby appointed Military Governor of the State of Louisiana, with authority to exercise and perform, within the limits of that State, all and singular, the powers, duties, and functions pertaining to the office of Military Governor (including the power to establish all necessary offices and tribunals and suspend the writ of *habeas corpus*), during the pleasure of the President, or until the loyal inhabitants of that State shall organize a civil government in conformity with the Constitution of the United States.

By the President.

SEAL OF U. S.

E. M. STANTON,

Secretary of War.

* *Note to the Tenth Edition.* — The President has recently appointed as a Judge of the District Court of the United States for the Eastern District of Louisiana, Hon. Charles A. Duvall, whose nomination has been confirmed by the Senate.

† See *The Grapeshot*, 9 Wallace, 131 (Appendix, p. 598).

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EXECUTIVE ORDER, ESTABLISHING A PROVISIONAL COURT IN LOUISIANA.

EXECUTIVE MANSION,
WASHINGTON, October 20, 1862.

The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a Court of Record for the State of Louisiana, and I do hereby appoint CHARLES A. PEABODY, of New York, to be a Provisional Judge to hold said Court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the Courts of the United States and Louisiana — his judgment to be final and conclusive. And I do hereby authorize and empower the said Judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a Prosecuting Attorney, Marshal, and Clerk of the said Court, who shall perform the functions of Attorney, Marshal, and Clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said Judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensation as follows: . . . . . Such compensations to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such Judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

SEQUESTRATION COMMISSION.

GENERAL ORDERS No. 91.

HEAD-QUARTERS, DEPARTMENT OF THE GULF,
NEW ORLEANS, November 9, 1862.

The Commanding General being informed, and believing, that the district west of the Mississippi River, lately taken possession of by the United States troops, is most largely occupied by persons disloyal to the United States, and whose property has become liable to confiscation under the acts of Congress

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and the proclamation of the President, and that sales and transfers of said property are being made for the purpose of depriving the Government of the same, has determined, in order to secure the rights of all persons as well as those of the Government, and for the purpose of enabling the crops now growing to be taken care of and secured, and the unemployed laborers to be set at work, and provision made for the payment of their labor, —

To order, as follows: —

I. That all the property within the district to be known as the "District of Lafourche," be and are hereby sequestered, and all sales or transfers thereof are forbidden, and will be held invalid.

II. The District of Lafourche will comprise all the territory in the State of Louisiana lying west of the Mississippi River, except the parishes of Plaquemines and Jefferson.

III. That

Major JOSEPH M. BELL, Provost Judge, President,
Lieut. Col. J. B. KINSMAN, A. D. C.,
Capt. FULLER (75th N. Y. Vols.), Provost Marshal of the District,

be a commission to take possession of the property in said district, to make an accurate inventory of the same, and gather up and collect all such personal property, and turn over to the proper officers, under their receipts, such of said property as may be required for the use of the United States army; to collect together all the other personal property, and bring the same to New Orleans, and cause it to be sold at public auction to the highest bidders, and, after deducting the necessary expenses of care, collection, and transportation, to hold the proceeds thereof subject to the just claims of loyal citizens and those neutral foreigners who in good faith shall appear to be the owners of the same.

IV. Every loyal citizen or neutral foreigner who shall be found in actual possession and ownership of any property in said district, not having acquired the same by any title since the 18th day of September last, may have his property returned or delivered to him without sale, upon establishing his condition to the judgment of the Commission.

V. All sales made by any person not a loyal citizen or foreign neutral, since the 18th day of September, shall be held void, and all sales whatever, made with the intent to deprive the Government of its rights of confiscation, will be held void, at what time soever made.

VI. The Commission is authorized to employ in working the plantation of any person who has remained quietly at his home, whether he be loyal or disloyal, the negroes who may be found in said district, or who have, or may hereafter, claim the protection of the United States, upon the terms set forth in the memoranda of a contract heretofore offered to the planters of the parishes of Plaquemines and St. Bernard, or white labor may be employed at the election of the Commission.

VII. The Commissioners will cause to be purchased such supplies as may be necessary, and convey them to such convenient depots as to supply the

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planters in the making of the crop; which supplies will be charged against the crop manufactured, and shall constitute a lien thereon.

VIII. The Commissioners are authorized to work, for the account of the United States, such plantations as are deserted by their owners, or are held by disloyal owners, as may seem to them expedient, for the purpose of saving the crops.

IX. Any persons who have not been actually in arms against the United States since the occupation of New Orleans by its forces, and who shall remain peaceably upon their plantations, affording no aid or comfort to the enemies of the United States, and who shall return to their allegiance, and who shall, by all reasonable methods, aid the United States when called upon, may be empowered by the Commission to work their own plantations, to make their own crop, and to retain possession of their own property, except such as is necessary for the military uses of the United States. And to all such persons the Commission are authorized to furnish means of transportation for their crops and supplies, at just and equitable prices.

X. The Commissioners are empowered and authorized to hear, determine, and definitely report upon all questions of the loyalty, disloyalty, or neutrality of the various claimants of property within said district; and further, to report such persons as in their judgment ought to be recommended by the Commanding General to the President for amnesty and pardon, so that they may have their property returned; to the end that all persons that are loyal, may suffer as little injury as possible, and that all persons who have been heretofore disloyal may have opportunity now to prove their loyalty and return to their allegiance, and save their property from confiscation, if such shall be the determination of the Government of the United States.

By command of MAJOR-GENERAL BUTLER.

GEO. C. STRONG,
A. A. G., Chief of Staff.

JURISDICTION OF COURTS APPOINTED BY MILITARY AUTHORITY TO ADMINISTER JUSTICE.

Military courts, being lawfully established by virtue of the war power of the President, as a part of his military government over the territory of a public enemy, with jurisdiction over all persons and things within the district to which the judge's commission is limited, have the right to make and enforce rules for the creation and service of process, and for all other proceedings before them. Their judgments may be rendered subject to appeal, if so directed by the President. The orders and

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decisions of the judges will be final and conclusive upon all subjects, matters, and persons over whom they have, by the terms of their commissions, exclusive and final jurisdiction. From such decisions and judgments there is no appeal to any judicial court of the United States.* They must be forever recognized by all departments of government as valid and conclusive.†

DOES THE CONSTITUTION PROHIBIT SUCH PROCEDURES?‡

The question may be asked whether courts administering municipal or local laws, condemning criminals without previous indictment, trial by jury, limitation of place in which trial shall be held, and without right of appeal, are not within the prohibitions of the Constitution.

The clauses referring to these subjects are as follows:—

Amendment, Art. V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces; or in the militia, when in actual service in time of war or public danger," &c.

Amendment, Art. VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," &c.

Amendment, Art. VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law."

* *Dynes* v. *Hoover*, 20 How. 79 (See Appendix, p. 520); *Vallandigham's Case*, Appendix, p. 524.

† See Notes to Forty-third Edition, on "Military Government and Reconstruction" (p. 427), and "Military Courts," p. 446.

‡ *Note to Forty-third Edition.* — Since this edition was in type, the constitutional power of the President to establish provisional courts in rebel States during the war, has been affirmed (1870) by a unanimous decision of the Supreme Court of the United States in the case of *The Grapeshot* (9 Wallace, 131), Appendix, p. 601.

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To understand the true meaning and application of the fifth, sixth, and seventh articles of the Amendment above cited, it is necessary to observe that citizens owing allegiance to the government of the United States are by civil territorial war divided into two classes, having different rights and being subject to different liabilities; first, the inhabitants of loyal States who have upheld the government; and second the inhabitants of rebellious States, who, by inaugurating civil war, have become our public enemies. There are also two classes of loyal citizens; first, those who are in the military or naval service; and second, those who are not. Military courts may be regarded as, first, ordinary courts, organized and acting under provisions of statutes, and administering the laws of war upon persons engaged in our military service; second, as courts established by the war power of the Commander-in-Chief, while carrying on the domestic government of territorial public enemies in hostile districts held by our military forces. But, however organized or established, such courts exercise no part of the judicial power of the government under the Constitution. Hence it is obvious that the Articles of Amendment above cited have no application to military courts, or to the proceedings thereof; but relate only to the exercise of civil and judicial power conferred on judicial courts.* Art. 5th expressly excepts from its prohibitions cases arising in the land and naval forces, or in the militia when in actual service. Art. 6th secures to the accused a speedy and impartial public trial in the State and district where the crime shall have been committed, but only in case

* See *Dynes* v. *Hoover* (Appendix, p. 520); *Vallandigham's Case* (Appendix, p. 524); *Milligan's Case* (Appendix, p. 536); Comments on this case (Appendix, p. 460); also, p. 278, and Index, title "Supreme Court."

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of judicial proceedings in ordinary criminal courts. Art. 7th is by its own terms expressly limited to suits at common law. These regulations of procedures in judicial courts apply to tribunals of a character totally different from *military courts*. The Constitution sanctions courts military and courts judicial, and requires the latter to be conducted according to these Articles of Amendment, while it places the former under no such restrictions. The Supreme Court, recognizing this distinction in the case of Dynes *v.* Hoover,* says that "these provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practised by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." Thus it is evident that whoever is subject to the jurisdiction of lawful courts of war, can claim none of the benefits of these Articles of Amendment. It has been also shown that citizens of the United States who have been declared by our Government *public enemies* of the country, have no rights guaranteed to them under any provisions of our Constitution.

WHAT RIGHTS THE INSURGENTS CLAIM.

To form correct opinions in relation to the rights of persons inhabiting that part of the country now subjected to the government *de facto* of the so-called Confederate States, it is proper to ascertain what rights they claim. Having founded new governments within the terri-

* 20 How. Rep. 79. (See Appendix, p. 520.)

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tory over which our national sovereignty extends, under the asserted right of revolution; having ratified those governments, both confederate and state, by popular conventions, by legislative acts of secession, by submission, by profession of allegiance, and by all other known modes of expressing assent and adherence thereto, they have publicly withdrawn from and disclaimed all allegiance to the United States. They demand that we should treat them as an independent nation. They not only assert no right to protection under our constitution, but wage open, barbarous, offensive war against the inhabitants of the loyal States and against our government. They seek recognition from and alliance with foreign countries, and if successful in arms, they will be entitled to compel the United States to submit to them as conquerors. Our territory, our government, and our population will then be subjected to their control. Their laws and their institutions will then be forced upon us, and nothing but the overthrow and destruction of their government can prevent this result.

They have already been recognized by leading European powers as BELLIGERENTS. They have demanded and have received from our government, the concession of many *belligerent rights;* as for instance, the exchange of prisoners of war captured on land; the release of confederate seamen condemned for piracy; and the recognition of flags of truce, and the blockade of seaports, under the law of nations.

The claim, so far as it can be ascertained, of the confederate *de facto* government, is that the United States should concede to the insurgents full belligerent rights, and should recognize them as an independent nation. No demand of any right under our constitution or our laws has ever been made by them. Those

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who deny their obligation to perform the duties imposed on all subjects of the United States, have not fallen into the absurdity of claiming the privileges of citizens. The confederates claim only such rights as the law of war, which is a part of the law of nations, secures to them. That claim this government is bound to concede, whenever it determines to treat them, not as subjects, but as belligerents.

Have the insurgents admitted liability on their part to regard our laws or constitution in carrying on war against us? Have they not forsworn their allegiance to this government, and can they claim protection while denying allegiance? Can an enemy justly assert any right under a constitution he is fighting to destroy? The insurgents deem themselves public enemies to the United States in open war, and admit their liability to abide by the stern rules of belligerent law. They demand no privilege under a constitution which, by commencing war, they have violated in every clause.

Is it not remarkable that persons who profess to adhere to our government should set up pretensions on behalf of our adversaries which our adversaries themselves disclaim?

RIGHTS CONCEDED TO INSURGENTS.*

Whoever makes war against a nation renounces all right to its protection. The people of the United States have founded a government to secure the "general welfare," by preventing enemies, foreign or domestic, from destroying the country. They did not frame a constitution so as to paralyze the power of self-defence. They have not forged weapons for their adversaries, or manacles for themselves.

The Constitution, in fact, guarantees no *rights*, but only

* See Note, p. 425.

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declares the *liabilities*, of public enemies, — if they are invaders, that they shall be repelled; if they are insurgents, that they shall be put down by force; if they are rebels, banded together in territorial civil war, then that civil war shall be fought through, and conquest and subjugation shall reëstablish lawful government. Any other result must be a destruction of the country, and therefore an overthrow of the Constitution.

In the enforcement of these hostile measures against public enemies, the most liberal concession demanded by the code of civilized warfare, is that traitors should be deemed belligerents; but, while enjoying the immunities, they must be subject to the liabilities, of war.*

Therefore, whether the Articles of Amendment of the Constitution, previously cited, apply to martial proceedings or not, is immaterial in determining the rights of a hostile people engaged in civil war against the United States.

The appeal to arms and the laws of war was forced upon us, because the insurrectionary districts refused to submit to the Constitution. They cannot, therefore, justly complain that under the laws of war they are no longer sheltered by that constitution which they have spurned.

ARE THE INHABITANTS OF INSURRECTIONARY STATES PUBLIC ENEMIES?

Whether persons inhabiting insurrectionary States are in law to be deemed "public enemies," is a *political* question, which, like similar questions arising under our form of government, is to be determined, *not* by judicial courts of law, but by the legislative and executive departments.†

* See the Prize Cases, 141, 238; also, 2 Black's R. 638.

† Some of the consequences flowing from the *status* of a public enemy are stated on pp. 236–244.

See Notes to Forty-third Edition, p. 425. Also, titles "Public Enemies," The "Policy of the Government," and "A brief Statement of the War Powers," p. 390.

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Among those subjects which, as the Supreme Court of the United States has already decided, are finally to be determined by the political departments of government, are the following, viz.: (*a*) Questions of boundary between the United States and foreign countries.*

"A question like this," says Chief Justice Marshall, "respecting boundary of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the legislature." Taney, C. J., says, "The legislative and executive branches having decided the question, the courts of the United States were bound to regard the boundary determined on by them as the true one." †

(*b*) Questions as to the sovereignty of any foreign country; or as to its independence; or as to the international relations with our government of foreign invaders of our country, or of any nation whose provinces or dependencies are in a state of rebellion, are also political and not judicial.

"To what sovereignty any island or country belongs," says Judge McLean, "is a question which often arises before courts. * * * And can there be a doubt that when the *executive* branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, *assume a fact* in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire whether the Executive is right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the United States. * * * In the cases of *Foster* v. *Nelson* and *Garcia* v. *Lee*, this court have laid down the rule

* *Foster & Elam* v. *Nelson*, 2 Pet. 307.

† *United States* v. *Percheman*, 7 Pet. 51. *United States* v. *Arredondo* (1832), 6 Pet. 711. *Garcia* v. *Lee*, 12 Pet. 516, 517, 520, 522.

Note to Forty-third Edition. — With regard to the jurisdiction of courts there is a distinction between questions of boundary which involve rights of sovereignty and of political jurisdiction, or political rights over the territory in question, and those which involve mere rights of property. See *Georgia* v. *Stanton*, Appendix, p. 548.

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that the action of the political branches of the government, in a matter that belongs to them, is conclusive." *

(*c*) Questions relating to the admission of States into the Union, or to the recognition of local governments as the governments of States in the Union, belong to the political, not to the judicial power to decide; as, for example, whether the government of Rhode Island should be recognized by the United States as the duly constituted government of that State. Therefore the Supreme Court declared that it had not the power to try or determine this question, so far as the United States was concerned. Congress delegated to the President, by the Statute of Feb. 28, 1795, the power to decide for the purposes of that act, whether a government organized in a State was the duly constituted government of that State, and, after he made his decision, the courts of the United States were bound to conform to it.†

(*d*) Questions as to the *legal* status of all persons who shall have engaged in insurrection, rebellion, or civil war against the United States, are also of a political character, determinable only by the executive and legislative branches of our government. ‡

It will, therefore, be the duty of the President and

* *Williams* v. *Suffolk Ins. Co.*, 13 Peters, S. C. R. 420 (McLean, J.).

See also *Gelston* v. *Hoyt*, 3 Wheaton, 246; *United States* v. *Palmer*, 3 Wheaton, 610.

† *Luther* v. *Borden*, 7 Howard, S. C. R. 40, 42–44.

‡ *Luther* v. *Borden*, 7 Howard, 40, 44; Lawrence's Wheaton, 514; *Martin* v. *Mott*, 12 Wheaton, 29, 30; Law Reporter, July, 1861, 148; *The Tropic Wind*, Opinion of Judge Dunlop; the prize case *Hiawatha* and others, 2 Black. 638; War Powers, pp. 141, 215. See also charge of Nelson, J., on the trial of the officers, &c., of the Savannah, p. 371. In this case the rebel privateer put in as a defence his commission to cruise under the confederate flag; and the same defence was made in Philadelphia, by other persons indicted for piracy. In both cases it was held that the courts must *follow the decision of the executive and legislative departments* in determining the political status of the Confederate States. See also Smith's Trial, p. 96; *Santissima Trinidad*, 7 Wheaton, 283, 305. Upton's Maritime Warfare and Prize, second edition, pp. 44–107.

Note to Forty-third Edition. — See also Halleck's Law of Nations, 720, and authorities there cited; Lawrence's Wheaton, p. 43, note; *Neueva Anna Liebre*, 6 Wheaton, R. 193; also, Index, "Policy of the Government;" and cases recently decided by the Supreme Court. Appendix, pp. 512–610.

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of Congress to decide all questions of public policy which may grow out of the rebellion. Of these, the most important are, 1. Whether the Confederates shall have the legal status of mere insurgents, or that of belligerent public enemies. 2. Whether local governments formed, or to be formed, within the territory in rebellion, shall be sanctioned by the United States. 3. Whether, when, and on what conditions, a state of peace shall be established or declared. 4. Whether the Confederate States shall be recognized by receiving their commissioners, by acknowledging their independence, or by any other act of our government. Such decisions on these and on similar matters are binding and conclusive upon the Federal courts.

STATUS OF THE INSURGENTS AS DETERMINED BY THE PRESIDENT.

The acts and proclamations of the Executive Department have stamped as "public enemies" all persons residing in the insurrectionary States. The President issued a proclamation on the 15th April, 1861, which declares that the laws had been opposed and their execution obstructed, for some time past, in certain States, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. He called out 75,000 of the State militia in order to suppress said combinations. On the 19th of April, 1861, he proclaimed a *blockade* of the ports within certain States, in pursuance of *the laws of nations* and the statutes of the United States in such case provided, and gave warning that vessels breaking or attempting to break that blockade should be *captured* and *condemned as lawful prize.* He also declared that any persons who, under pretended authority of said States, should molest any United States vessel, should be

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deemed pirates. This blockade was, by a subsequent proclamation of April 27, 1861, extended to other States.

By the proclamation of May 10, 1861, he suspended the privilege of the writ of habeas corpus in the islands on the coast of Florida.

On the 16th of August, 1861, in pursuance of an Act of Congress, he declared "that the inhabitants of the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida (excepting the inhabitants of Western Virginia, etc.), *are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States, and other parts of the United States, is unlawful, and will remain unlawful until such insurrection shall cease, or has been suppressed.*" He then declared *forfeiture* of goods, or conveyances thereof, *going to* said States, and, after fifteen days, of *all vessels belonging in whole or in part to any inhabitant* of any of said States (except as aforesaid), wherever found.

On the 1st of July, 1862, he again declared the same States in *insurrection and rebellion*, so that the taxes could not be collected therein, in pursuance of the Act of 1861, Chapter 45.

On the 25th of the same month, he gave a further warning under the provisions of the sixth section of the Act of July 17, 1862, requiring rebels to "*return to their proper allegiance to the United States*, on pain of forfeitures and seizures," as provided for in said Act.

The proclamation of Sept. 22, 1862, was made by the President as an Executive officer and as Commander-in-Chief of the Army and Navy, "that the *war* will be prosecuted hereafter as heretofore for the purpose," etc.;

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that slaves in *States* which should be *in rebellion* on the first day of the following January should be free, and that he would, by subsequent proclamation, designate such States; and at that date (January 1, 1863), the President did designate such States, and did declare "*that all persons held as slaves within said States*, etc., are and hereafter shall be free," and "that the executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons."*

From an examination of these proclamations issued by President Lincoln, by virtue of his executive power and as a military chief, it cannot be doubted that in the most solemn and formal manner he has recognized the *inhabitants* of the insurrectionary States as in *civil war*, and therefore *as public enemies*. His proclamation characterizes these hostilities as "the war now prosecuted;" he requires the rebels to "return to their proper allegiance to the United States," admitting that they have renounced such allegiance; in all his proclamations, excepting the first, he treats *the inhabitants* of the rebellious States as *in simili statu* (with specified exceptions only), and in the proclamation of Jan. 1, 1863, no exceptions are made of any class of persons within the designated districts.

The Executive Department has thus definitely settled the question that all inhabitants of the designated States are *public enemies*, — First, by proclamations depriving them of slaves, of ships, and of property used in commerce; by a blockade and a declaration of *non-intercourse;* by claiming against them the *rights of war;* and by asserting that the existing hostilities are "WAR." Second, by extending to the insurgents the usual rights

* See the President's Proclamation, April 2, 1863.

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and privileges of a belligerent public enemy; as by release of captured pirates (under the order of the President issued from the State Department) as prisoners of war,* by exchange, *by cartel*, of prisoners of war captured on land, by claiming the right of retaliation, and by various other acts, which are legitimate in the conduct of the war, but irreconcilable with the assumption that the United States are not engaged in war, but only in enforcing the laws against certain criminals who have violated certain statutes by engaging in insurrection or rebellion.†

If these acts and these proclamations do not show that the Executive Department has *declared* and *determined* the *status* of the inhabitants in insurrection to be that of *public enemies*, it would be difficult to conceive of any course of executive proceedings that would have had that effect.‡

STATUS OF THE INSURGENTS AS DETERMINED BY CONGRESS.

The action of the Legislative Department, which has been in harmony with that of the President, has in like manner definitively pronounced the inhabitants of insurrectionary States to be public enemies. In the war of 1812, between the United States and Great Britain, the Act of July 6, 1812, and the Act of February 4, 1815, indicated the character and extent of legislation necessary to record the decision of the Legislative Department, that Great Britain was at that time a public enemy.

But since the present rebellion commenced, Congress has enacted laws far more stringent and comprehensive than either of those above cited, against the inhabitants of the rebellious States. The four chief acts which re-

* See page 215.

† *Note to Forty-third Edition.*—To these acts may now be added the surrender of the armies of Generals Lee and Johnston, upon terms which are deemed obligatory upon the United States.

‡ The effect of the President's Message and Proclamation of Amnesty of December 8, 1863, upon the persons, property, and political rights of the inhabitants of rebellious States, far transcends in importance that of either of his previous executive acts.

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cord the decision of Congress on the question whether rebels are *public* or private enemies, are, —

1. The Act of July 13, 1861, ch. 3.
2. " " " May 20, 1862, ch. 81.
3. " " " July 17, 1862, ch. 195.
3. " " " March 12, 1863, ch. 120.*

In the extraordinary but brief session of the 37th Congress, which assembled on the 4th of July, 1861, and lasted but thirty-three days, statutes of the highest importance were passed, and among them none will hereafter attract more attention than the Act of July 13, 1861, ch. 3. Means were thereby provided for collecting the revenue in rebellious districts by the use of military and naval forces, the President was authorized to close ports of entry, and it was enacted, in the fifth section,—

" That whenever the President, in pursuance of the provisions of the second section of the act entitled 'An act to provide for the calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose,' approved February 28, 1795, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then in such case it may and shall be lawful for the President, by proclamation, to *declare* that *the inhabitants of such State, or any section or part thereof* where such insurrection exists, are in a state of insurrection against the United States; and thereupon *all commercial intercourse* by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and *all goods and chattels, wares and merchandise coming from* said State or section into the other parts of the United States, and all *proceeding to* such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be *forfeited* to the United States."

* *Note to Forty-third Edition.* — Several subsequent acts may now be added to the above. See act of July 2, 1864, which extends the prohibitions of the act of 1861 to all the inhabitants of the designated States. See also the Appropriation Act, 1865 (Chap. 81). Also, the Reconstruction Acts, cited in the Notes.

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Also, in the sixth section, it was enacted, —

"That from and after fifteen days after the issuing of the said proclamation, as provided in the last foregoing section of this act, any ship or vessel belonging in whole or in part to any citizen or inhabitant of said State or part of a State whose inhabitants are so declared in a state of insurrection, found at sea, or in any port of the rest of the United States, shall be forfeited to the United States."

By the Act of May 20, 1862, ch. 81, further provisions were made interdicting commerce between loyal and disloyal States, and new forfeitures and penalties were prescribed.

By the Act of July 17, 1862, ch. 195, a new punishment for the crime of treason was declared, penalties were prescribed against all persons who should engage in, or give aid or comfort to the rebellion or insurrection, and they were declared to be disqualified from holding office under the United States. By Section fifth it was enacted, —

"That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estates and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States; that is to say, —

"First. Of any person hereafter acting as an officer of the army or navy of the rebels in arms against the government of the United States.

"Secondly. Of any person hereafter acting as president, vice-president, member of Congress, judge of any court, cabinet officer, foreign minister, commissioner, or consul of the so-called confederate states of America.

"Thirdly. Of any person acting as governor of a State, member of a convention or legislature, or judge of any court of the so-called confederate states of America.

"Fourthly. Of any person who, having held an office of honor, trust, or profit in the United States, shall hereafter hold an office in the so-called confederate states of America.

"Fifthly. Of any person hereafter holding any office or agency under the government of the so-called confederate states of America, or under any of the several states of the said confederacy, or the laws thereof, whether such office or agency be national, state, or municipal in its name or character. *Provided*, That the persons, thirdly, fourthly, and fifthly above described,

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shall have accepted their appointment or election since the date of the pretended ordinance of secession of the State, or shall have taken an oath of allegiance to, or to support the constitution of the so-called confederate states.

"Sixthly. Of any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion; and all sales, transfers, or conveyances of any such property shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section."

Section sixth provided that if any persons other than those above named, had engaged in, or aided the armed rebellion, and should not within a limited time *return to their allegiance*, their property should be liable to seizure and condemnation.

Section seventh provided proceedings for confiscation of such property, real and personal, —

"And if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as *enemies' property*, and become the property of the United States."

"Slaves escaping, and taking refuge within the lines of the army, and all slaves captured from, or deserted by, those engaged in rebellion, and coming under control of the government of the United States, and all slaves of such persons found or being within any place occupied by rebel forces, and afterwards occupied by forces of the United States, shall be deemed captives of war," etc.

The Act approved March 12, 1863, ch. 120, § 1, provides that agents may be appointed by the Secretary of the Treasury to collect all abandoned and captured property in any State or Territory designated as in insurrection by the proclamation of July 1, 1862, —

"*Provided*, that such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordinance, ships, steamboats, or other water craft, and the furniture, forage, or other military supplies or munitions of war."

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Section fourth of the same statute, provides,—

"That all property coming into any of the United States not declared in insurrection as aforesaid, from within any of the states declared in insurrection, through or by any other person than any agent, duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated to the use of the government of the United States. And the proceedings for the condemnation and sale of any such property shall be instituted and conducted under the direction of the Secretary of the Treasury, in the mode prescribed by the eighty-ninth and ninetieth sections of the act of March 2, 1799, entitled, 'An act to regulate the collection of duties on imports and tonnage.' And any agent or agents, person or persons, by or through whom such property shall come within the lines of the United States unlawfully, as aforesaid, shall be judged guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned for any time not exceeding one year, or both, at the discretion of the court. And the fines, penalties, and forfeitures accruing under this act, may be mitigated or remitted in the mode prescribed by the act of March 3, 1797, or in such manner, in special cases, as the Secretary of the Treasury may prescribe."

From these statutes it is seen that the Legislative Department has recognized "certain districts of country, not only as in a state of insurrection and rebellion," but as "*carrying on a war*" against the United States. Commercial intercourse has been interdicted between the insurrectionary and the loyal States, and property found *in transitu* is made liable to seizure and confiscation, for the use of the United States, and property of persons engaged in the rebellion is to be seized and confiscated as ENEMIES' property. The *inhabitants (that is to say* ALL *the inhabitants) of the insurrectionary States, or parts of States, are declared to be in a state of insurrection against the United States, and any ship or vessel, belonging in whole or in part to any citizen or inhabitant of such State, whose inhabitants are so declared in insurrection, found at sea, or in any of the loyal or disloyal States, shall be forfeited to the United States.**

* *Note to Forty-third Edition.*—See joint resolution approved Feb. 8, 1865. See Notes in Appendix on the "Reconstruction Acts," "Military Government," and Index—title "Public Enemies."

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Thus belligerent rights derived from the acknowledged existence of civil territorial war, have been plainly asserted and exercised by Congress, and the insurgents have been declared *public enemies* in every form and manner known to legislation, and in language far more stringent than that used by the Parliament of Great Britain, when, by the Non-intercourse Act, our revolutionary rebellion was changed into public territorial war.*

THE ACTION OF THE SUPREME COURT IN RELATION TO POLITICAL QUESTIONS.

Has the Supreme Court thus far followed the decisions of the political departments of government on the question as to the *status* of rebels as public enemies, that is to say, as enemies within the sense of international law? This question will be answered by reference to the cases which have arisen since the beginning of the war. By far the most important decisions on this subject were made in March, 1863, and are commonly known as "The Prize Cases." † In these opinions the judges plainly recognize the insurgents as public enemies, following, in that respect, as was their duty, the decision of the Political Department of the government. How could a judgment, condemning these vessels as lawful prize, be sustained if the belligerents were not admitted to be *public enemies?* Though a vessel, captured while trading with an enemy, may be lawful prize, irrespective of the character, whether friendly, neutral, or hostile, of the trader to whom it belongs, yet it is because his vessel, if released, may aid a *public enemy*, that it becomes liable to capture. No property of a friendly or neutral power can be lawfully captured because it

* See Act 16 Geo. 3, 1776, also the dissenting opinion in the Prize cases.

† For the opinion of the Court in the Prize cases, and that of the dissenting judges, see pp. 140–156. For analysis of these opinions, see pp. 238–243.

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might aid a criminal, a robber, a pirate, or an *insurgent*, while acting merely as a *private* or personal enemy of the United States. The law of prize has no application to the case of personal or private enemies, and cannot be invoked to justify a capture of private property, unless there exists a *public enemy* and a *state of war*.

Blockades, under the law of nations, can lawfully exist only when there is a *public enemy* to the country which proclaims and enforces them.

The Circuit Courts of the United States, having adjudged the inhabitants of States declared in rebellion to be public enemies, have thus conceded that they are not entitled to sue in any of the national courts.*

Doubtless the disability to sue in courts of the United States, and all other disabilities resulting from the *status* of a public enemy, may be removed. But it is for the President and Congress to determine what sound policy and public safety shall require.

It is a matter of congratulation that there is no want of harmony between the different departments of Government, and that the Supreme Court has not gone beyond its legitimate functions in time of civil war; but has, by following the decisions of the political departments on political questions, given the best evidence that, even in revolution, it will not be necessary for the safety of the country to overthrow its judiciary.

Thus it has been shown that the question whether the inhabitants of the States in insurrection are "*public enemies*," and entitled to the rights, or subject to the liabilities of belligerent law, is to be decided, not by the

* See *Bouneau* v. *Dinsmore*, 24 Law Rep. 381. S. C. 19 Leg. Inst. 108. *Israel G. Nash* (of North Carolina) *Complt.* v. *Lyman Dayton et al.* (decided by Nelson, Judge of the United States Circuit Court of Minnesota). See *U. S.* v. *The Isaac Hemmett*, Legal Jour. 97; also, *U. S.* v. *The Allegheny*, ib. 276, and *Mrs. Alexander's Cotton*, app.. 534.

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judicial, but by the *political* departments of this Government: that the Executive and Legislative Departments have formally and finally decided that the rebels are public enemies, and subject to the laws of war: that the Judicial Department has submitted to and followed that decision; and that the question as to the *political status* of rebellion is now no longer open for discussion: that whatever rights, other than the rights of war, may be conceded to the inhabitants of rebellious territory, will be bestowed on them from considerations of policy and humanity, and not from admission of their claims to rights under our Constitution.*

* Messrs. Fishback and Baxter claimed recognition as United States senators from the State of Arkansas, a State declared by proclamation of the President to be in rebellion. Since the first publication of this essay, the Senate, on the 29th of June, 1864, resolved that they were not entitled to seats therein, — yeas, 8; nays, 25.

Note to Forty-third Edition. — Similar resolves have since been passed in relation to several other persons who have claimed to be senators or representatives from seceded States. The principles here stated have been sanctioned by several laws of Congress, by acts of the Executive Department, and by decisions of the Supreme Court. See Notes on Reconstruction, and the collection of decided cases in the Appendix.

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CHAPTER V.

DELEGATION OF AUTHORITY.

Judicial authority cannot be delegated, and as the commander of a department, or other officer who presides over a military tribunal while determining a case of civil jurisdiction, acts in a *quasi* judicial capacity, a question has been made whether the right to hold such courts can be delegated by the President to his officers. Although such proceedings of the war courts as complaints of parties, pleadings, examination of witnesses, deliberations and decisions of judges, in many respects resemble those of judicial courts, yet, as they are not deemed judicial within the true meaning of the Constitution, no valid objection arises from that source, to the delegation of the power to hold military courts, to such officers as may be appointed by the President.

This, and nearly all the war powers, must be exercised through officers acting under the Commander-in-Chief; for his authority must be exerted at the same time in different and distant places; and as he cannot be omnipresent, that authority which could not be delegated would become comparatively useless. The practice of the Government has, from the beginning, been in accordance with this view of constitutional law.

The power of the President is in part delegated to his Secretary of War, whose acts are deemed in law to be the acts of the President.* The commanders of military

* *Wilcox* v. *Jackson*, 13 Pet. R. 498.
Opinion of Wm. Wirt, Atty Genl. (July 6, 1820).
U. S. v. *Eliason*, 16 Pet. S. C. R. 291.

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departments are clothed with authority transferred to them by the Commander-in-Chief. Therefore, if that authority is not limited so as to prevent it, they have the right, while in the enemy's country in time of war, to organize military courts martial and commissions, and to administer all other belligerent laws. Tribunals so organized may exercise all functions properly conferred upon them, and their decisions are not only valid, but are not subject to reversal by any judicial court; but only by the final action of the President.

So also, if a military governor is placed over such hostile district, clothed with the powers of the Commander-in-Chief, he may himself administer the laws of war over those subjected thereto within his precinct, and may establish courts military and civil, with jurisdiction over all persons and things therein. And whether he acts on his own discretion in so doing, under general orders, or under special orders in each case, he is, according to military law, responsible only to his superior officer.

Although no *civilian*, or *civil* or *merely executive* officer, has a right to institute a military court, unless deriving special authority to do so from some law of Congress or from military orders, there seems to be no reason why any of the war powers, in time of actual service, may not be delegated to military men by the President, or by any other military officer who possesses them; and no reason for making any distinction between the different classes of powers which may be so delegated.

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CHAPTER VI.

HOW MILITARY OR PROVISIONAL GOVERNMENTS MAY BE CREATED AND REGULATED BY CONGRESS.

The right and duty of administering purely military government belongs to the war-making power, which is usually subject only to the rules of the belligerent law. When that power is regulated by any treaties, constitution, or statutes of the invading country, then military governments established under it must be conducted in accordance with the laws of war, as modified by such legislative, constitutional, or treaty restrictions. Thus, wherever in the United States such a government shall be instituted by the Commander-in-Chief, his administration of it may, to a certain extent, and with certain limitations, be regulated by acts of Congress.

The right of the United States to acquire territory by purchase, treaty, or annexation, necessarily implies the existence in Congress of the power to establish some form of government over *regions* thus *added to the country*. Conquest itself confers on the conqueror authority to make laws for the conduct of people subjected to his power. The right of the government when conqueror in civil territorial war to make rules and regulations relating to conquest and captures may, by the Constitution of the United States, be exercised by the Legislative Department.

A provisional government, partaking in a high degree of a martial character, may be ordained and established over *subjugated districts* in time of *civil* war, by laws

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of Congress, and may be administered by civilians or by military persons, appointed by the President, according to the requirements of the statutes.

It is also the duty of Congress to pass all laws which are proper and fit to aid the President in carrying into effect his obligation to suppress rebellion and enforce the laws, to secure domestic tranquillity, and to guaranty to each State a republican form of government.* And as the creation and administration of military or provisional governments are essential means of accomplishing these objects, it would seem for this reason also to be the duty of Congress, in aid of the Commander-in-Chief, and without interfering with his military operations, to erect governments over the subjugated districts, clothed with powers adequate to administer the laws of war, subject to the Constitution and the statutes of the United States, and to such orders as the President may from time to time issue, not inconsistent therewith. Governments thus established rest not alone upon the military power of the President as Commander-in-Chief of the army and navy, but upon the war powers of Congress, and should be so organized as to endure until the people of these districts shall be again permitted to resume self-government, and be again clothed with their former political rights.†

Therefore, although the President may, while engaged in hostilities, and in the absence of laws restricting his authority, enforce belligerent rights against a public enemy, Congress also may establish rules and regulations which, without interfering with his powers

* Constitution, Art. 1, Sect. 8, Ch. 18. See *ante*, p. 269.

† The model of our territorial governments, in time of peace, is the Ordinance of 13th July, 1787.

See 3 Story, Com. on Const. 1312.

Webster's Speeches, Jan. 1830, pp. 360-364.

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as commander of the army, it will be his duty to administer.

In a province to be subdued by soldiers, the only means by which the will of Congress, or the will of the head of the army can usually be carried into execution, is by force of arms. In one sense, all government, whether provisional or *quasi* civil, established under such circumstances, must assume a military character. In that view it can be controlled by Congress only through use of the military power of the army. Yet the President is bound to execute all laws which Congress has a right to make; and so far as the Legislature has the *authority* to interfere with or control the President by laws or by regulations, or by imposing upon him the machinery of provisional governments, so far he is bound to administer them according to statute.

LIMITS OF POWER. CONFLICT BETWEEN THE WAR POWERS OF THE PRESIDENT AND THE LEGISLATIVE POWERS OF CONGRESS.

Though the Executive, Legislative, and Judicial departments of our government are to a certain extent independent of each other, yet no one of these departments is without some control over the others. The legislature can make no law without the concurrence of the President, unless passed by two-thirds of the voters in both houses; and laws, when made, may be pronounced unconstitutional by the Supreme Judicial Court. The judiciary, in deciding purely political questions, are bound to follow the decisions of the Legislative or Executive departments, and are in other respects controlled by the action of the coördinate branches of the government. The Executive can make treaties only by concurrence of the Senate; and most of the appointments to high offices must, to be valid, be made with its

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advice and consent. The President cannot declare war; but Congress can. Congress cannot carry on war; but the President can. Congress may make rules and regulations concerning captures, and for the government and regulation of the land and naval forces, when in service, binding upon the President, whose duty it is to see *all* constitutional laws faithfully executed, although he is the supreme commander of the army and navy.

Questions may therefore arise as to the limitation of the respective powers of the Commander-in-Chief in conducting hostilities, and the powers of Congress in controlling him, by virtue of this legislative right to make rules and regulations for the government of military forces, and respecting captures on land and sea.

To determine how far Congress may interfere with and govern the military operations of the Executive, when the war power is employed in enforcing *local government* by martial law, without derogating from his power as Commander-in-Chief of the army, will require careful consideration, inasmuch as such government can be in fact maintained and enforced only by military, and not by legislative authority.

HOW THESE GOVERNMENTS MAY BE TERMINATED.

Military governments may be terminated by the commanding general at his will, by withdrawal of the officers who administer it.

As it is in the power of the Legislative Department to declare war, and to provide or withhold the means of carrying it on, Congress also may, after hostilities shall have ceased, declare or recognize peace, terminate military or provisional governments, or may regulate them

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and cause them to be modified or wholly withdrawn, whether originally erected by its own authority or by the war power of the President, and may institute civil territorial governments in their place.* Or the people of any district, in which hostilities have ceased, having formed a new government for themselves, by permission of the United States, may be admitted into the Union as a State, and thus the military government will be displaced.† But military governments are not of necessity terminated by a declaration of peace between belligerents, or by a cession of territory in dispute, but may be continued long after war ceases, by presumed assent of the President and of Congress. "The right inference," says Mr. Justice Wayne, in delivering the unanimous opinion of the Supreme Court, ‡ "from the inaction of both the President and of Congress, is, that it (the military government) was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the cause of delay, it must be presumed that the delay was consistent with the true policy of the Government." "California and New Mexico were acquired by conquest confirmed by cession. During the war they were governed as conquered territory, under the law of nations, and in virtue of the belligerent rights of the United States as the conqueror, by the direction and authority of the President as Commander-in-Chief. By the ratification of the treaty of Guadalupe-Hidalgo, on the 20th of May, 1848, they became a part of the United States, as ceded conquered territory. The civil governments established in each during the war, and existing at the date of the treaty of peace, continued in

* *Note to Forty-third Edition.* — See note on Military Government and Reconstruction, pp. 427–451.

† See Index, "Reconstruction."

‡ *Cross* v. *Harrison*, 16 How. 193.

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operation after that treaty had been ratified. California, with the assent and coöperation of the existing government, formed a constitution which was ratified by its inhabitants, and a State government was put in full operation in December, 1849, with the implied assent of the President, the officers of the existing government of California publicly and formally surrendering all their powers into the hands of the newly-constituted authorities. The constitution so formed and ratified was approved by Congress, and California was, on the 9th of September, 1850, admitted into the Union as a State. New Mexico also formed a constitution, and applied to Congress for admission; the application was not granted, but on the 9th of September, 1850, New Mexico, and that part of California not included within the limits of the new State, were organized into territories, with new territorial governments, which took the place of those organized during the war, and existing on the restoration of peace." *

Such governments, founded only in and sustained by war power, are, when peace is officially recognized, entirely within the control of Congress.

When the enemy have laid down their arms, and make no further opposition to the execution of our laws, there can exist no reason why the President should not obey and enforce the rules and statutes of Congress, regulating his own conduct and the military governments and military tribunals established by him. No reason could be offered to explain why he should not make complete and unquestioning submission to the will of the people. His refusal to do so would subject him to impeachment.

* Halleck, Int. Law, 828, 829.

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There seems to be less danger to civil liberty from the use of military governments and tribunals as temporary instruments for carrying on war and of securing conquest, than from any other mode of employing military forces.

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CHAPTER VII.

It has been shown in the foregoing chapters, that the President has authority to establish military governments over enemy's territory in time of civil war, because the Constitution, by designating him as Commander-in-Chief of the Army and Navy, confers on him the right to use, in prosecuting hostilities, all means which may be necessary and proper for that purpose, including, as such means, the establishment of military governments and of military courts, which are not only the necessary but are the usual means employed by belligerents in making war, and in securing the objects for which it has been carried on. This right has been recognized and sanctioned in several cases by the Supreme Court of the United States. Our next inquiry relates to the character and extent of the powers which may be exercised by military governments.

JURISDICTION OF MILITARY GOVERNMENTS.

To such military governments as are established by the Commander-in-Chief, in time of war, he may delegate more or less power, according to the object for which he has instituted them.

In the District of Columbia, a military governor has been appointed for the performance of certain limited duties essential to the police regulation of the forces stationed within the defences of Washington, the treatment of persons under arrest and in prison, and other important specific duties. In the mean time, the

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sessions of the Supreme Court of the United States, and of the local courts, and of Congress, and the business of all the departments of the Government, are undisturbed.

In districts of country declared to be in rebellion, whose inhabitants are "public enemies," such governments have been commissioned with powers to administer local, municipal, civil, and criminal law, and with jurisdiction embracing all persons and all questions which may arise therein.

There is no other necessary limit to the jurisdiction of a military governor, than there is to that authority under which he received his appointment. The existence of state or municipal governments, or of military, civil, or ecclesiastical tribunals, established before the war began, in the rebellious districts, does not affect the jurisdiction of such governments or courts as may be erected therein by the war power of the United States. Since these sections of country have become hostile — the inhabitants thereof being now public enemies — no authority of such enemies, executive, judicial, or military, can be recognized by the conqueror as rightful or legitimate. No legislature, no judiciary of a public enemy, can be permitted to retain or exercise any jurisdiction or control over persons or property found in that region which is within the military occupation of our army.

The enemy's courts and legislatures derive their right to ordain and enforce laws from a government at open war with our own, — one which we refuse to recognize, and we might as well acknowledge the independence of the seceding States, and surrender our army and navy to the insurgents, as to subject ourselves or to allow others to be subjected to their laws, their courts, or their jurisdiction. A public enemy has no right, either by courts instituted by him, or by any civil, military, or judicial

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officers appointed by him, to exercise authority in any locality which is held by our military power. But all persons and all subjects who are found there, are under our military control, whether that control be exercised by soldiers in the field, or by military governors, who may call to their aid military tribunals, or may even allow civil tribunals to proceed under military authority.

The only limitations to the jurisdiction of such military power over persons and property, are such as are derived from the laws of war; though in the United States further limitations may be prescribed by laws of Congress.

Hence, aliens residing in belligerent districts, non-combatants, whether neutral, friendly or hostile, persons engaged in hostility, persons belonging to the invading country, and accompanying the army, are alike within the jurisdiction of a military government, and of military courts duly established therein.

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CHAPTER VIII.

THE LAW ADMINISTERED BY MILITARY GOVERNMENTS.

As the powers of a *de facto* government belong to the conqueror by the laws of war, he may suspend, modify, or abrogate all municipal laws of those whom he has conquered; he may disregard their former civil rights and remedies; he may introduce and enforce a new code of laws, military and municipal, and may carry them into effect by new military tribunals, having abolished all courts and offices held under the authority of his enemy. *

It has been held by the Supreme Court that "the laws, whether in writing or evidenced by the usage and customs of the conquered or ceded country, *continue in force till altered* by the new sovereign." †

While they continue in force, it is by the express or implied permission of the new sovereign, and until altered by him. They are recognized only as an expression of the will of the conqueror.‡ If the law should conflict with the will of the conqueror, the LAW must yield;

* Halleck, Int. Law, pp. 830, 831, and cases there cited.
Bowyer, Universal Public Law, ch. 16, 158.
Fabrigas v. *Mostyn*, 1 Cowper, 165.
Gardner v. *Fell*, 1 Jacob and Walker, 27.
Flemming et al. v. *Page*, 9 How. 603.
Am. Ins. Co. v. *Canter*, 1 Peters, 542.
Cross et al. v. *Harrison*, 16 How. 164.
Heffter, Droit Int'l, sect. 185.

† *Strother* v. *Lucas*, 12 Peters, 436, and authorities there cited.

‡ For the operation of transfers of territory upon the laws and rights of the inhab-

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otherwise the conqueror would be subjected to the rule of those whom he has subjugated.

But the local laws of a conquered country may be changed not only by the law-making power of the conquering country, but by virtue of the BELLIGERENT rights of the conqueror.*

All these propositions follow from the fact that the power of a public enemy to make or administer law is terminated by the conquest of their territory by a different law-making and law-administering power, viz., that of the conqueror.

The local laws of a conquered country of which our army holds military occupation, have no force or effect whatever, except by our permission.† When such local laws agree with those of the invading country, such laws may be, and usually are, adopted and sanctioned because they do so agree therewith. Thus rules governing the rights of property, the relations of persons,

itants of the territory ceded or conquered, see, among other authorities, the following, viz: —

Vattel, B. B. ch. 13, sects. 199, 201.
4 Com. Dig. Ley. (C.)
Calvin's Case, 7 Coke, 176.
Blankard v. *Galdy*, 2 Salk. 411; S. C. 2 Mod. 222.
Mostyn v. *Fabrigas*, Cowp. 165.
Hall v. *Campbell*, Cowp. 204, 209.
Anon. 2 P. Williams, 76.
Ex parte Prosser, 2 Br. C. C. 325.
Elphinstone v. *Bedreechund*, Knapps, P. C. R. 338.
Ex parte Anderson, 5 Ves. 240.
Evelyn v. *Forster*, 8 Ves. 96.
Sheddon v. *Goodrich*, 8 Ves. 482.
2 Ves. Jr. 349.
Att'y Gen'l v. *Stewart*, 2 Meriv. 154.
Gardiner v. *Fell*, 1 Jac. and W. 77.
8 Wheaton, 589; 12 Wheaton, 528–535.
6 Pet. 712; 7 Pet. 86, 87; 8 Pet. 444–465.
9 Pet. 133, 734, 749.

* *Cross* v. *Harrison*, 16 How. 199.

† *Note to Forty-third Edition.* — Several of the seceded States, since the surrender of the rebel armies, have either passed, or have attempted to enforce, their local laws in relation to freedmen and colored citizens, which have been forcibly set aside by the commanders of our military departments under the reconstruction acts.

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and the laws of crimes in the respective countries of the belligerents, are often so nearly alike that the administration of them is permitted to remain unchanged even in war. But no laws or institutions established by law are permitted to survive, which are in conflict with those of the conqueror.

In all cases, the will of the conqueror governs. Hence, in a ceded or subjugated territory, all laws violating treaty stipulations with foreign nations, or granting rank and titles or commercial privileges in conflict with the institutions of the conqueror, are abrogated.*

It has been asserted that the municipal laws of a belligerent territory remain in force, "*proprio vigore*," until altered by military orders; but, although such laws may have been tacitly adopted, or the enforcement thereof may have been permitted, it is not because these laws retained any validity "*proprio vigore*." Their only validity was derived from the tacit or express sanction and adoption thereof by the will of the commander-in-chief of the invading army.

In case of conquest of a foreign country, the question has been asked, what laws, if any, of the invading country are *ipso vigore*, and without legislation extended over the territory acquired in war?

The suppression of the present rebellion is not the conquest of a *foreign* country. The citizens of the United States residing in the districts in rebellion are not *alien* enemies, though they are *public* enemies; and it is important, in several points of view, to observe the dis-

* Halleck, Int. Law, 833, 834, and authorities there cited:
Bowyer, Univ. Pub. Law, ch. 16.
Campbell v. *Hall*, 1 Cowper, 205.
Fabrigas v. *Mostyn*, 1 Cowp. 165.
Gardner v. *Fell*, 1 Jacob and Walk. 27, 30, note.
Att'y Gen'l v. *Stewart*, 2 Merivale, 159.

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tinction between enemies who are subjects of a foreign government, and are therefore called "*alien enemies*," and those who are denizens and *subjects* of the United States, and being engaged in civil war, are called "*public enemies*."

An alien owes no allegiance or obedience to our government, or to our constitution, laws, or proclamations. A citizen subject is bound to obey them all. In refusing such obedience, he is guilty of crime against his country, and finds in the law of nations no justification for disobedience. An alien, being under no such obligation, is justified in refusing such obedience. Over an alien enemy, our government can make no constitution, law, or proclamation of obligatory force, because our laws bind only our own subjects, and have no extra-territorial jurisdiction.

Over citizens who are subjects of this government, even if they have so far repudiated their duties as to become enemies, our constitution, statutes, and proclations are the supreme law of the land. The fact that their enforcement is resisted does not make them void. It is not in the power of armed subjects of the Union to repeal or legally nullify our constitution, laws, or other governmental acts.

The proclamations of the President, issued against insurgents, in the performance of duties imposed on him by the Constitution; the Acts of Congress, in executing its powers; and the decisions of the Supreme Court of the United States, are all, in one respect, "like the Pope's bull against the comet;" these proclamations, laws, and decisions will be alike resisted and spurned by our adversaries so long as they can carry on the war. But when the soldiers of the Union shall have routed and dispersed the last armed

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force of the rebellion, and when the supremacy of our military power shall be undisputed, the constitution, proclamations, laws of Congress, and decisions of the Supreme Court will at the same time, *pari passu*, be acknowledged and enforced. It is therefore idle to speculate upon the legal validity and operation of the proclamation liberating enemies' slaves, in districts not yet secured by our military possession. It would be equally useless to attempt to determine the validity and operation of our constitution, laws, and decisions of courts in these rebellious districts. Neither of them will be enforced upon the enemy until they have been subjugated. When that event takes place, whether it be the result of battles or of returning sanity of repentant madmen, the army of the United States will then have actual possession of every portion of the United States, and of every slave who may be found therein; and the right of the slave to his freedom under the constitution and under the statutes passed, and the proclamations issued by the government during the war, will be secured to him at the same time that other rights under the same constitution and proclamations will be secured to the other inhabitants of the country. And there can be no doubt that in civil war the laws of the United States, rightfully extending at all times over the whole country, are to be enforced, so far as applicable, in time of war, over the belligerent territory as fast as it comes under our military control; and that in case of complete conquest, the constitution and laws of the Union will be restored to full operation over all the inhabitants thereof. At the same time, the laws of war will have swept away all local hostile authorities, and all laws, rights, and institutions resting solely thereon.

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The Commander-in-Chief has the right, during war, to treat their local laws as inoperative, or to adopt some and reject others; to permit the holding of courts by local authorities acting under military power of the conqueror, or to forbid them, and to substitute military courts of his own. Having all the rights of war over the subjugated inhabitants, he has all the powers of a government *de facto* and *de jure*, and can therefore impose upon them whatever laws or regulations may suit his pleasure, in accordance with the laws of war. The LAWS OF WAR are the only laws required by the Constitution to be laid by military power upon public enemies in time of civil war. Congress may modify by legislation the hardship of belligerent rights.

But whatever may be done or omitted by the President or by Congress, the laws and municipal institutions of the conquered inhabitants are "swept by the board." Whatever law is rightfully administered, is law expressly declared or tacitly permitted by the will of the conqueror.*

JUDICIAL COURTS OF THE UNITED STATES.

The courts judicial, as established by laws of Congress in the seceded States, having been closed by civil war, may be reëstablished whenever the districts over which they have jurisdiction shall be permanently reduced under the power of the United States.

When the officers of such courts, either by engaging

* For authorities on this question, see
Halleck, Int. Law, 832.
Calvin's Case, Coke's Rep. part 7.
Gardner v. *Fell*, 1 Jacob and Walker, 22.
Cross v. *Harrison*, 16 How. 165.
Collet v. *Lord Keith*, 2 East. 260.
Blankard v. *Guldy*, 4 Mad. 225.

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in rebellion or otherwise, have become in law public enemies, their right to exercise judicial or other functions under authority of the United States ceased, and their offices were vacated. If new appointments were to be made now, it is obvious that the authority of courts could be enforced only by military power; their jurisdiction would be very limited; such juries as they could summon would probably be hostile to the Union, and the powers of judges, under present laws, would be be totally inadequate to meet the demands of these turbulent times. Hence it would be worse than useless to erect *judicial* courts before *peace* is completely restored.* It would tend to bring the judiciary into contempt. Therefore it can hardly be deemed advisable to interfere with the stern, effective, but necessary government of hostile people by military power, until Congress shall by legislative act *recognize* a state of peace.†

* See remarks of Chief Justice Chase, at Raleigh, N. C., in June, 1866: Appendix, 596.

† *Note to Forty-third Edition.* — Since this was written, the condition of the rebel States has changed. They have all been restored to the Union under the provisions of the reconstruction acts, and by the instrumentality of military governments.

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WAR CLAIMS,

AGAINST

THE UNITED STATES.

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PREFACE TO THE WAR CLAIMS.

THE following essay on claims against the United States for injuries done to the persons and property of foreigners by our military and naval forces during the war, was in substance prepared while the author was Solicitor of the War Department. In pursuance of an understanding with Mr. Seward, Secretary of State, and Mr. Stanton, Secretary of War, a practice was adopted, and adhered to throughout the war, of referring to the Solicitor of the War Department for his investigation and opinion such claims against the United States for damage or indemnity, growing out of our military operations, as had been or should be presented by the ministers or other representatives of foreign powers. The results of such investigations were transmitted in writing to the Secretary of State, who was at liberty to make such use of them as he thought proper in preparing his official correspondence.

The Opinions appended to this essay, which embrace some of those above mentioned, were written under great pressure of business. It is hoped that, however imperfect in style, they may be found correct in substance. The essay on "War Claims" was composed at the request of the Secretary of State, in order to facilitate the labors of those on whom, after the author's retirement from office, the duty might devolve of examining similar

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questions;* and with a view to secure uniformity of decisions by the government. The first printed edition was issued in 1866, and was distributed among the officers of the War, State, and Navy Departments, and has been in use down to the present time. A request for a new edition has induced the author to add it to the present publication, with the subject matter of which it is closely connected.

* The office of Solicitor of the War Department was created by Statute 20 February, 1863, Chap. 44, Sect. 3. The author was appointed Solicitor under this act at the time of its passage. Although he resigned his office when the war was over (in April, 1865), and the law which established it was not repealed until the passage of the act of 28th July, 1866, no successor was ever appointed.

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WAR CLAIMS

AGAINST

THE UNITED STATES.

THE inhabitants of countries involved in domestic or civil war are liable to suffer injuries to their property and to their persons by the military operations of both belligerents. Whether they have legal claims to indemnification for losses sustained by them depends upon their *political status*, as defined and recognized by the law of nations, or by treaties, or by the constitutions and laws of the community with which they have been associated. In order to discern with more clearness the political relations of the claimants to the government, it should be observed that our *citizens*, when carrying on war against a foreign enemy, differ widely from rebels in arms against their lawful government as to their respective rights and liabilities, as defined by international or belligerent law and by the constitution and laws of the United States. Rebels in civil war, if allowed the rights of belligerents, are not entitled to all the privileges usually accorded to *foreign* enemies. An alien enemy is a public enemy; but a

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public enemy may not be an alien enemy. As the rightful authority of our government over its rebellious subjects, who have become public enemies, is far greater than it would be over alien enemies, it is not wise or prudent, in the present condition of our country, to surrender or to underrate that authority.

Of persons who now demand indemnity there are two classes: 1st, Those whose property has been used, captured, or destroyed by *rebel* armies; and, 2d, Those who have suffered similar injuries by the military operations of the national forces. That the political relations of this second class to the general government may be more distinctly defined, it will be found convenient to arrange these claimants in the following order: —

1. Loyal citizens of the United States domiciled in the loyal States.
2. Disloyal citizens of the United States who have given aid and comfort to the rebellion, although they have retained their domicile in the loyal States.
3. Loyal citizens of the United States domiciled in the Confederate States.
4. Disloyal citizens of the United States domiciled in the Confederate States, being such as have aided or favored the rebellion, or such as have remained non-combatants.
5. Aliens, within the United States, owing allegiance to a foreign government.

Claims to compensation for injuries inflicted on aliens during the rebellion will be the subject of the following observations: The rights of our own citizens to indemnity may be the subject of a subsequent examination.

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Foreigners dwelling or being within the United States during the war may be distinguished as follows: —

1. Those who have given aid to the rebellion.

2. Those who have been naturalized under the laws of the United States.

3. Neutral non-naturalized aliens who have exercised the elective franchise in either of the loyal States.

4. Neutral non-naturalized aliens who have acquired a permanent domicile in the United States, and were inhabitants thereof during the war, either, (*a.*) in the rebel States, or, (*b.*) in the loyal States.

5. Neutral non-naturalized aliens, who, when hostilities commenced, were merely travellers passing through the rebel States; or were inhabitants thereof for some limited purpose, and had a temporary residence, but not a personal domicile, therein; of whom there are, (*a.*) those who chose to remain during the war; and, (*b.*) those who, within reasonable time, withdrew their persons and their property from the *de facto* rebel jurisdiction.

6. Neutral aliens, whose *mercantile* domicile was in the rebel States, whatever may have been the place of their *personal* domicile.

With regard to claims for depredations committed by rebels, it is sufficient to observe that the concession of belligerent rights to the so-called government of the Confederate States by a European power, releases the United States from all claims for injuries inflicted upon the subjects of that power by the hostile operations of the Confederate forces. If the acts of our rebellious citizens, injurious to foreigners, had been deemed and

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treated as merely insurrectionary, we might have been liable to indemnify foreigners against them; but no liability for their acts exists in cases where rebellious citizens are clothed by foreign nations with the immunity of belligerents, and are admitted to the *quasi* national rank of combatants in civil war. If aliens have any claim for losses or injuries occasioned by the hostilities of the Confederate government, to that government alone they must look for compensation. The law of war requires no nation to indemnify neutrals for injuries inflicted on them by its enemy.*

The practice of modern nations has established certain general rules of public law which declare the rights of neutrals and of belligerents in civil as well as in international wars; and of these the following deserve especial attention in dealing with the rights and liabilities of foreigners.

"Aliens resident here owe allegiance to the United States; so if they are abroad and leave their families here." †

Flagrante bello no subject of a belligerent can transfer allegiance, or acquire foreign domicile, by emigration from his own country, so as to protect his trade against the belligerent laws of that country, or against those of a hostile power.‡

Every nation, whenever its laws are violated by any one owing obedience to them, whether he be a citizen or a stranger, has a right, with certain exceptions, to

* See Letter of Mr. Canning to Mr. Del Rios, March 25, 1825. Papers relating to Foreign Affairs, p. 89. Mr. Adams, June 14, 1861. Mr. Black to Lord Lyons, Jan. 10, 1861. Cong. Doc. 36 Cong. 2d Sess. Wheaton's Int. Law, p. 44, note of Mr. Lawrence.

† 3 Greenleaf on Evidence, p. 239, note.

‡ Halleck, Int. Law, 717, sect. 29, and cases there cited.

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inflict the penalties incurred upon the transgressor, if found within its jurisdiction.*

"When a nation is at war with another nation, *all the members* of the one nation *are the enemies* of the other nation. This rule of joint association in war applies to *adopted* citizens equally as to natural born citizens." †

In the language of Grotius, "All the subjects of the sovereign from whom an injury has been received, who are such for a permanent cause, are liable to the law of reprisals, whether they be natives or citizens." ‡

"Strangers who come into an enemy's country after a war has been begun and is known to exist, may, undoubtedly, be treated as enemies; and those who have gone thither before the war commenced, may, by the law of nations, be taken for enemies after a moderate time within which they should depart." §

"Foreigners who, by acquired domicile, participate in the commercial privileges of the citizens or subjects of a country, must also share the inconveniences to which the latter are subjected." ||

"It is undoubtedly a principle of international law," said Lord Palmerston in relation to claims against us of British merchants, growing out of our bombardment of Greytown, "that when one government deems it right to exercise acts of hostility against the territory of another power, the subjects and citizens of third powers,

* See Mr. Marcy's Letter to Mr. Jackson, chargé d'affaires at Vienna, Jan. 10, 1854. Cong. Doc. 33 Cong. 1 Sess. H. R. Ex. Doc. 41. Huberus, tom. ii. l. i. tit. 3, De Conflict. Leg. § 2.

† Twiss, Law of Nations, vol. i. p. 82.

‡ Grotius, De Jure B. et P., L. III. c. 2, § 8, 2.

§ Grotius, De Jure B. et P., L. III. c. 4, § 6, 7.

|| Wheaton, p. 173, note 59. See answer of Mr. Marcy, Secretary of State, Feb. 26, 1857, to M. de Sartiges, Minister of France, in reply to his application for indemnity for property of French subjects destroyed by the naval forces of the United States in the bombardment of Greytown. See Senate Ex. Doc. No. 9, 35 Cong. 1st Sess.

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who may happen to be resident in the place attacked, have no claim whatever upon the government which, in the exercise of its national rights, commits these acts of hostility."

In this opinion the attorney-general concurred; and he stated that France, as well as England, had refrained from making demand on the United States for satisfaction for losses incident to the destruction of that ill-famed town. "The principle which governs these cases is, that the citizens of foreign states who resided within the arena of war had no right to demand compensation from *either* of the belligerents for losses or injuries sustained." He alluded to the bombardment of Copenhagen, as an historical case in point.*

To the same effect was Lord Palmerston's answer in the House of Commons to the inquiry of Mr. Adams "whether it was his intention to introduce any measure enabling Her Majesty's government to compensate British merchants whose property at Uleaborg, in the Gulf of Bothnia, had been destroyed on the 2d of June, 1854, by the boats of a squadron under command of Admiral Plumridge." After referring to his decision in the case of Greytown, he said "that the British subjects holding property at Uleaborg had had such property destroyed by hostile movements of the British navy against the Russians; but that they must take their chance of the protection of the Russian empire: and if the place where their property was situated became the scene of hostile operations, no claim could possibly be set up by these persons, whatever country

* See Hansard, Parl. Deb. 3d Series, vol. cxlvi. pp. 37, 49. Debate in H. of Com., June 19, 1857.

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they might belong to, against the government whose forces carried on the hostilities by which they had been made to suffer." *

"By the law of nations all the subjects of an offending power, whether they are natural born subjects or persons who have acquired a *domicile* in his territory by long residence therein, are liable in their persons and their property to the operation of reprisals made against that power; but individuals who may be only temporarily resident in the country, or travelling through it, do not thereby incur any liability to reprisals; for the liability to undergo reprisals is as it were a liability to share the burden of a public debt to which those are not liable who are subject to the laws of a country only for a time." †

1. Aliens engaged in active hostilities against the United States, or in aiding the rebellion, forfeit all rights as neutrals, and are subject to be treated as alien enemies, according to the law of nations. Moreover, by associating themselves with rebels, they violate certain acts of Congress, and, if convicted, incur the penalties therein provided. The allegiance they owe to a foreign government will shelter them from condemnation or punishment under our laws against treason, but cannot protect them in committing offences against other statutes. The rebel flag will be no safeguard to the hostile foreigner who slaughters and plunders the citizens and subjects of a country with which

* See Hansard, Parl. Deb., June 17, 1857, vol. cxlvi. p. 1045.

† Twiss, Law of Nations, vol. i. p. 38. Grotius de Jure Belli, L. III. c. 2, § 7. It was decided in 1853 by a joint commission, to which was referred the claims of Laurent and other Europeans who were in Mexico when Gen. Scott invaded that country, and who demanded damages for losses occasioned by the American army, that when a foreigner holds real estate in a country he identifies himself with the fortunes of the citizens of that country, in peace or war, and must abide all consequences.

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his own sovereign is on terms of friendship or neutrality. If his body be mutilated, or if his property be captured or destroyed in the regular prosecution of hostilities, he can have no moral or legal claim for indemnity against the government which he has attempted to overthrow. He must share the misfortunes of those with whom he has voluntarily associated himself, and must blame his own folly or wickedness for all the evils he may have to endure. No foreign country, which claims to be neutral or friendly to the United States, can lawfully afford protection against the hazards of war to its citizens who have taken up arms against us. Such hostile foreigners, being our enemies, can look for indemnification only to that pretended or *de facto* government in whose service they have enlisted.*

2. Aliens who have been naturalized under the laws of the United States have become citizens, and are by statute entitled to nearly the same rights, and are charged with the same duties, as native born citizens,† although they are (by the 12th Amendment of the Constitution) not eligible as Presidents or Vice-Presidents. But if a foreigner, resident in this country, has not been naturalized according to law, his personal *status* will continue to be that of an *alien*, "and if war should arise between his native country and the country in which he has established himself, his personal relation with the latter country will be that of an *alien enemy*." ‡

It is not necessary to consider the rights of aliens who have become our enemies, or of those who have

* See Solicitor's Opinions, Nos. 95, 357, 707, 713, 935.
† Act 14 April, 1802, § 1.
‡ Twiss, Law of Nations, vol. i. p. 90.

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renounced allegiance to all foreign potentates, since no claims on their behalf are likely to be presented by European governments.

3. (*a.*) Aliens not naturalized, not having renounced their allegiance to their sovereigns, if they have at any time assumed to exercise the rights of an American citizen by voting at any election held under the authority of the laws of any State or Territory, or of the United States, or if they have held any office under any of such laws, are not exempted from enrolment or draft under the provisions of the acts for enrolling and calling out the national forces, and the act amendatory thereof.*

The laws of the United States do not permit foreigners to enjoy the privileges without incurring the obligation of citizens to support and maintain, against public enemies, that government in the administration of which they have voluntarily participated. Hence, whatever loss or damage to person or property may have been occasioned by, or may have resulted from, the performance of this duty, does not lay the foundation for any claim of indemnification.

3. (*b.*) Foreigners not naturalized, and not coming within this exception, being friendly or neutral, and having committed no act of hostility against the United States, also being domiciled in the loyal portions of the country, are not subject to do military duty, nor to have their property taken from them, nor to suffer unlawful injury to their persons by the military forces of the United States otherwise than if they were citizens; yet the government is not bound to give their

* See Act 3 March, 1863, and Act 24 Feb., 1864. Proclamation of the President, 8 May, 1863.

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persons or their property *more* protection than it is required by law to give, under like circumstances, to its own subjects, unless otherwise obligated by treaty stipulations. The Constitution provides that private property of citizens shall not be appropriated to public use without just compensation; but this provision has no application to the capture or destruction of enemy's property in time of war, whether the enemy are foreigners or citizens of the United States. The destruction or capture of the property of loyal citizens by military forces invading the loyal States, is not an appropriation of property by our government. Nor are we bound by the Constitution, or by any law of Congress, to indemnify our own citizens for losses thus occasioned. Still less do we owe such indemnity to foreigners. But if the private property of loyal citizens, inhabitants of loyal States, is *appropriated* by our military forces for the purpose of supplying our armies, and to aid in prosecuting hostilities against a public enemy, the government is bound to give a reasonable compensation therefor to the owner; and under like circumstances, it is obligated to give just compensation to neutral foreigners. But property of such citizens and of such foreigners may be destroyed by our military forces, under certain circumstances, without liability to pay for it. Thus, if one of our armies marches across a cornfield, and so destroys a growing crop, or fires a building which conceals or protects the enemy, or cuts down timber to open a passage for troops through a forest, the owner of such property, citizen or alien, has no legal claim to have his losses made up to him by the United States. Misfortunes like these must be borne wherever they fall. If any government is obli-

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gated to guarantee its subjects against losses by casualties of public war, such obligation must be founded upon some constitutional or statute law. Thus far no such obligations have been recognized in our system of congressional legislation.

DOMICILE.

In examination of the political status of all classes of aliens, it will be necessary in nearly every case to determine the question of domicile of the claimant; and it may be convenient here to define the meaning of the word *domicile,* as now understood by writers on international law.

"According to the law of nations, when the national character of a person is to be ascertained, the first question is, In *what territory* does he reside, and is he resident in that territory for temporary purposes, or permanently? If he resides in a given territory permanently, he is regarded as adhering to the nation to which the territory belongs, and to be a member of the political body settled therein. If he is only resident in a given territory for temporary purposes, he is regarded as a stranger thereto; and a further question must then be asked, In what country is his principal establishment, and *where,* when he has returned, does he consider himself to be at home? The country which satisfies the conditions implied in this further question is designated, in the language of public law, the *domicile* of the individual, which Vattel defines as 'a fixed residence in any place with the intention of always remaining there.'" *

* Twiss, Law of Nations, vol. ii. p. 233. Grotius, Droit des Gens, L. I. § 217.

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A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile.* "All such persons" (viz., all who have *become* subjects of the sovereign from whom an injury has been received, and who are subjects for a permanent, not transitory cause, whether natives or citizens; and all who came to reside within the country of a belligerent power with knowledge of the existence of war; and all who came into the country before the war, and continue to reside there after the commencement of hostilities for a longer time than is necessary for their convenient departure) "are *de facto* subjects of the enemy sovereign, being resident within his territory, and are adhering to the enemy so long as they remain within his territory. If, however, they quit the enemy's territory with the intention of abandoning it, and resuming a permanent residence in the country of their origin, they divest themselves of the hostile character at once upon so quitting the enemy's territory." †

A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation; ‡ but a party's putting himself *in itinere*

* Halleck, Int. Law and Laws of War, p. 714.

† 1 Twiss, L. of N., vol. i. p. 83.

Since the publication of the last edition, Congress has passed the Act 1868, ch. 71—which provides that the party asserting the loyalty of any person in a proceeding in any court must prove it; and that voluntary residence in rebel States is *prima facie* evidence of having given aid and comfort to the rebellion.

‡ 2 Gallison, 205, *Society* v. *Wheeler*.

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to return to his native country, will exempt property from a hostile character acquired by residence where such property has been engaged in a trade lawful in the native character, and not otherwise.*

4. In relation to neutral or friendly aliens who have acquired a permanent personal domicile in the *loyal* States before or during the war, few if any questions have arisen; and their rights are so well defined under the settled principles of international law, and by treaties of friendship and commerce between the United States and foreign nations, that their claims to protection or indemnity require no especial attention at the present time; but neutral or friendly aliens, who, before the war began, had acquired a permanent personal domicile in the States declared in rebellion, and who did not, within reasonable time after the commencement of hostilities, withdraw from those States, are by that law held to be public enemies of the United States; themselves and their property are liable to the same treatment as the persons and property of other public enemies.†

The proclamations of the President, and the acts of Congress against districts of country engaged in rebellion, include *all the inhabitants* thereof, without exception, and recognize them as public enemies.‡ One of these acts expressly refers to aliens.§

* 1 Gallison, 467, *The St. Lawrence.* Ibid. 614, *The Francis.*

† Twiss, L. of N., vol. i. p. 82. Grotius, de B. et P., L. III. c. 2, § 7.

‡ Act of Congress, 13 July, 1861, ch. 3. Proclamation, 6 Aug. 1861. Proclamation, 2 April, 1863.

§ Act July 2, 1864, ch. 225, sect. 4.

By this act it is provided that "the prohibitions and provisions of the act approved July 13, 1861, and of the acts amendatory or supplementary thereto, shall apply to all commercial intercourse by and between persons residing or being within districts within the present or future lines of national military occupation in the States or parts of States declared in insurrection, whether with each other or with persons residing or being

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The law of nations fully sanctions such legislation against those foreigners who prefer to take their chance under the rebel government rather than to rely on the protection of their lawful sovereign, and to entitle themselves to that protection by withdrawing from the enemy's country. They have the moral and legal right to remain in the hostile jurisdiction; but so remaining, they must take the hazards of the community with which they choose to cast their lot. Their continued residence in a rebellious district lends voluntary aid and countenance to the enemies of the Union by their presence, and by their property, which becomes liable to contribute, *by taxation* and otherwise, to the support of the rebellion. The means of carrying on war are thus, in part, supplied by those aliens who continue to associate themselves with rebels. Their property, found on the sea, is lawful prize, or if captured on land, it is lawful capture. It is not material to ascertain whether the sentiments or conduct of aliens so domiciled are hostile or friendly towards the Union. The fact of *remaining*, without effecting a removal of their persons and property from the enemy's country within reasonable time after the commencement of hostilities, is conclusive evidence that they are to be deemed in law public enemies. If the government, of whom they are subjects, has recognized a state of civil war, and has conceded to the rebels belligerent rights, all such subjects are bound by the act of their government to elect either to withdraw within reasonable time after such recognition and concession, or else to be forever after

within districts declared in insurrection, and not within those lines; and that all persons within the United States, not native or naturalized citizens thereof, shall be subject to the same prohibitions in all commercial intercourse with inhabitants of States or parts of States declared in insurrection, as citizens of loyal States are subject to under said act or acts."

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estopped from making any claims for indemnity other than those which could be rightly made by public enemies of the United States.*

5. Another class of neutral aliens consists of those who, at the commencement of the war, had a temporary residence, or were merely travellers, and had not acquired a permanent personal domicile in the Confederate States. As travellers, or as temporary residents, they had the right to retire and withdraw their property from the rebellious districts. They were bound to do so, or else to be treated as public enemies. *After* the war began, and, perhaps, after their own government had conceded to the rebels the rights of belligerents, they were entitled to have reasonable time in which they might remove from the country. But if they remained, and, assuredly, so long as they remained, after the expiration of that time, they could not, and cannot, complain of being subject to the same treatment as those with whom they have chosen to associate. If alien denizens of the Confederate States were prevented from leaving the country, or from withdrawing their property, by the Confederate government, or by any persons acting under their authority, these aliens may claim indemnity from that government, if it can be found; but the concession of belligerent rights to the Confederates by a foreign country estops it from making any claim against us for wrongs inflicted by our public enemies upon its subjects during the war.

If the United States government, by any law or authorized act of its officers, military or civil, prevented the exercise of the right of the alien to withdraw from

* Since the publication of the last edition of this essay, the principles above stated have been sanctioned by an unanimous decision of the Supreme Court of the United States in the case of *The Peterhoff*, 5 Wallace, 60, 1866–7. See also *The Venice*, 2 Wallace, 274.

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the country upon an authenticated application made by such alien to the proper authority, and if injury was suffered in consequence, the alien is entitled to indemnity. Yet an alien may lose his right to indemnity if he violates any of the laws of war, the proclamations of the commander-in-chief of the army, or the acts of Congress which regulate intercourse with the enemy. He cannot invoke to his aid laws which he has violated.

6. The claims to indemnity next to be considered are those of neutral aliens whose *mercantile* domicile was, at the beginning of the war, in the Confederate States, whatever may have been the place of their *personal* domicile.

"In general," says Wheaton,* "the national character of a *person*, as neutral or enemy, is determined by that of his domicile; but the *property* of a person may acquire a hostile character independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the beginning of a war in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere *residence in a neutral country*." †

* P. IV. ch. i. sect. 19, p. 573.

† 1 Rob. Adm. Rep. p. 1, *The Vigilantia.* 2 Ibid. p. 255, *The Susa.* 3 Ibid. p. 41, *The Portland.* 5 Ibid. p. 297, *The Jonge Klassina.* 1 Wheaton's Rep. p. 159, *The Antonia Johanna.* 4 Ibid. p. 105, *The Friendschaft.*

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"A naturalized citizen, for the purposes of trade, returned to his native country in time of peace, but with the intention of coming back to his adopted country. He remained in his native country twelve months after war had broken out between the two countries, for the purpose of closing his business (though he engaged in no new commercial transactions with the enemy), and then returned to his adopted country. It was held by the court that he had regained a domicile in his native country, and that his goods, captured after the war, were liable to condemnation."* The property of all the partners in a trading house in the enemy's country is lawful prize, though some of the partners have a neutral residence. The property of a person may acquire a hostile character although his residence be neutral.† The consul of a neutral state, *residing and trading* in a belligerent country, is *domiciled* in the belligerent's country, and his property is liable to capture and confiscation even if owned in partnership with other neutrals.‡

The commercial domicile of a merchant at the time of the capture of his goods determines the character of those goods.§ If a citizen of the United States establishes his *domicile* in a foreign country, between which and the United States hostilities afterwards break out, property shipped by such citizen before a knowledge of the war, and captured by an American cruiser after the declaration of war, must be condemned as *lawful prize.*|| The property of a *house of trade established in an*

* *The Francis*, 8 Cranch R. 355.
† *The St. Indiano*, 2 Gallis, R. 268.
‡ *Arnold* v. *U. S. Ins. Co.*, 1 Johns. Cases, 363.
§ *The Francis*, 8 Cranch R. 363.
|| *The Venus*, 1 Gallis. R. 253.

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enemy's country is condemnable as prize, whatever may be the *domicile* of the parties.* Goods which appeared by the ship's papers to be a consignment from alien enemies to American merchants were condemned *in toto* as prize, although further proof was offered that American merchants were *jointly interested*, and that they *had a lien* upon the goods, in consequence of advances made by them.† A foreign merchant, domiciled in the country of the enemy, is himself an enemy in the same sense and to the same extent as a native subject. ‡

"The national character of the *political* agent of a neutral state, who is resident in a belligerent country, is not affected by such residence, whatever may have been the duration of such residence; but it is otherwise with a *commercial* agent. A consul does not participate in the privilege of extraterritoriality, which a political enemy enjoys; and if he is personally engaged in the commerce of a belligerent country, his consular character affords no protection to his mercantile adventures." §

The belligerent rights of the United States against the property of an alien merchant are determined by the hostile or neutral character of the place where his trade is carried on. Neutral aliens, not naturalized,

* *The Friendschaft*, 4 Wheat. R. 105. *The Antonia Joanna*, 1 Wheat R. 169.

† *The Francis*, 8 Cranch R. 335.

‡ 3 Phillmore, Int. Law, § 85. 1 Duer on Insurance, 523. 4 Rob. Rep. 119, *Anna Catherina*. 3 Ibid. 41, *The Portland*. 1 Ibid. 14, *The Nancy*. 4 Wheat. 107, *The Friendschaft*. 2 Gallis. 268, *The San Jose Indiano*. Halleck on Int. Law, 721.

§ 1 Twiss, 315. Lord Stowell's opinion in Concordia, Lords, 5 Feb., 1782. Het. Huys, Lords, 16 July, 1784. *The Pigou*, Lords, 18 July, 1797. *The Orion*, Admiralty Court, 24 March, 1797. *The Sarah Christina*, 1 Rob. Chan. 238.

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and not having exercised any of the rights of citizenship, whether domiciled in the United States, or only carrying on trade here at the beginning of the war, are entitled to withdraw themselves and their property into another country within a reasonable time after hostilities, have been commenced. If they do not thus withdraw, they are liable to be treated, so far as relates to their property, as alien enemies, and as subjects of the hostile government *de facto* under whose dominion they have carried on their trade.

To the right of neutral or friendly aliens to withdraw property from the enemy's country, there are some limitations. The *produce of an enemy's territory* is to be considered hostile property so long as it belongs to the *owner of the soil*, whatever may be his national character in other respects, or whatever may be his place of residence. This exception to the general rule is well established in the courts of England and of the United States.*

"Certainly nothing can be more decided and fixed," said Sir William Scott, in pronouncing judgment in the case of The Phœnix, "as a principle of this court and of the Supreme Court upon very solemn argument there, than that the possession of the *soil* does impress upon the owner the character of the country so far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question

* *The Venus*, 1 Cranch, 8, p. 253. *The Phœnix*, Robinson's Admiralty R. V. p. 21. *The Vrou Anna Catharina*, V. Rob. Adm. R. 167.

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can be made upon the point of law at this day." "It cannot be doubted," says the same judge, in the Anna Catharina, "that there are transactions so radically and fundamentally national as to impress upon them the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

The Supreme Court of the United States * has confirmed and extended this doctrine. In the case referred to, the claimant, a Dane, owned a plantation in Santa Cruz. That island, then belonging to Denmark, was captured and held by Great Britain for a time. The claimant withdrew from it at the date of its surrender, and returned to his native country. While he was still in Denmark, his agent at Santa Cruz shipped a cargo of sugar, which was the produce of his plantation, and it was captured at sea by a United States cruiser as *enemy property*, during our last war with England. Although Denmark was a friendly power, and the claimant was also, so far as appears, well disposed towards the United States, the sugar, being the produce of a plantation in an island which, at the time of shipment, was in the actual possession and control of England, then our enemy, was held to be lawful prize of war, and was condemned as such.

* Thirty Hogsheads of Sugar, Benzon, claimant, 9 Cranch. R. 191–199.

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"The opinion," says the Court, "that the ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, was an opinion which prevailed very extensively. It was not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It was no extravagant perversion of principle, nor was it a violent offence to the course of human opinion, to say, that the proprietor, so far as respects his interest in the land, partakes of its character, and that its produce, while the owner remains unchanged, is subject to the same disabilities." *

An act of the Congress of the Confederate States, approved May 6, 1861, recognized and declared war with the United States, and authorized the use of all their land and naval forces, and the issue of letters of marque and reprisal. By an act approved August 8, 1861, all citizens not acknowledging the authority of the Confederate government, with certain exceptions, were ordered to depart from the Confederate States, and were declared *public enemies*.†

The Judges of the Supreme Court of the United States, in the recent case of the Hiawatha and other prize cases,‡ having unanimously agreed in the opinion

* Wheaton's Int. Law, Part IV. chap. i. § 21.

† Statutes of the Provisional Congress, pp. 100, 101. Acts of the Provisional Congress, chap. 19, p. 174.

‡ 2 Black's S. C. Rep. 638. For analysis of these opinions, see pp. 238-243.

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that the districts of country declared by the proclamations of the President to be in rebellion, and which were included in the non-intercourse act of July 13, 1861, were, after the passage of that act, to be treated by the courts as engaged in civil war, and that the inhabitants thereof were public enemies of the United States,* and were liable to all the disabilities of belligerent enemies, it follows that the principles of law as above stated *inter gentes*, equally apply to our civil war.† Hence no neutral or friendly alien, whatever his domicile during the war, has the right to claim indemnity for the capture or destruction, by the forces of the United States, of property which was the produce of his own plantations in any district of the country which was declared in rebellion; nor has he any right to withdraw that property from the belligerent country, unless by virtue of express treaty stipulations, or special authority granted to him in pursuance of the laws of the land.

Provision has been made by *treaties* between the United States and some foreign nations, whereby, in case of war breaking out between the two nations, it is stipulated that merchants of either nation, in the towns or cities which they inhabit, should be allowed six months after the declaration of war, to collect and transport their merchandise; and that, should they suffer

* For an examination of the cases on this subject, and the action of all departments of our government, see Military Government, pp. 290–306.

† The decision that the inhabitants of those parts of the country which have been declared in rebellion are, by the laws of war and under the Constitution and laws of the United States, *public enemies*, rests upon the authority of the political departments of our government. That decision is binding on the judiciary, whose duty is to recognize and conform to it. That duty has been honorably performed by the Judges of the Supreme Court in the above-cited cases, in which they decide whether certain ships and cargoes were or were not lawful prizes.

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any damage or injury in the mean while, at the hands of the citizens or subjects of either of the contracting parties, they should have full and entire satisfaction. As this privilege, which is deemed, by some authoritative writers on international law, a right by the common law of war, is conceded to certain foreigners when their country is in open hostility to the United States, it would be inconsistent to refuse that right or privilege to the same foreigners, if, while preserving neutrality towards us, they should be overtaken by a civil war in the United States. A violation of this privilege by the government, or by any persons acting under its authority, should be followed with prompt and full indemnity.*

"Aliens residing in belligerent districts; non-combatants, whether neutral, friendly, or hostile; persons engaged in hostility; persons belonging to the invading country, and accompanying the army, — are alike within the jurisdiction of military government, and of military courts duly established therein." †

Aliens, who are subjects of a foreign government, having voluntarily enlisted in the service of the United States as substitutes for drafted men, are not entitled to be discharged from such service by reason of alienage; but may, under the law of nations, be held to perform their engagements, without giving the government to whom their allegiance is due, just cause of complaint.‡

* See treaty between the United States and France, 5 Feb., 1778.

† Military Government, p. 318.

‡ See Opinion, No. 448 (p. 374), in the case of deserters from a French corvette, who were enlisted as substitutes, and whose discharge was claimed by the French consul.

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"Service in the rebel army by an alien does not deprive him of the benefit of the plea of alienage against any claim of this government for military service. The volunteering of an alien in the army of the United States to serve for a given period, subjects him to all the rules and regulations of the military service during the term of his enlistment. After his contract of enlistment has expired he still has the rights of alienage against the United States. The proclamation (of neutrality) of the Queen gives the United States no rights over British subjects, though its violation subjects them to the penalties of British laws, and to those of the laws of war." *

"Persons who reside in a country engaged in active hostilities, and who so conduct themselves as to give reasonable cause to believe that they are aiding and comforting a public enemy, or that they are participating in any of those proceedings which tend to embarrass military operations, may be arrested; and if such persons shall be arrested and imprisoned for the purpose of punishing or preventing such acts of hostility, they are not entitled to claim indemnity for the injury to themselves or to their property, suffered by reason of such arrest and imprisonment. If the persons so arrested are the subjects of a foreign government, they cannot lawfully claim indemnity, because their own hostile conduct, while it has deprived them of the shelter of neutrality, has subjected them to penalties for having violated the laws of war. If a foreigner join the rebels, he exposes himself to the treatment of rebels.

* See Opinion, No. 433, p. 374. See also *Wilson* v. *Izard*, 1 Paine, 68. *Juando* v. *Taylor*, 2 Ib. 652; also, contra, Judge Conkling's Opinion in Matter of Ross (Recorder's Court of Buffalo, 1842). Opinions of the Attorney General, vol. iv. p. 350.

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He can claim of this government no indemnity for wounds received in battle, or for loss of time or suffering by being captured and imprisoned. It can make no difference whether his acts of hostility to the United States are committed openly under a rebel flag, or secretly in the loyal States, where his enmity is most dangerous. If it be said that he has violated no municipal law, and therefore ought not to be deprived of liberty without indemnity, it must be remembered that if he has violated any of the laws of war, he may have thereby committed an offence more dangerous to the country, and more destructive in its results, than any crime defined in statutes."

"If a person detained in custody in consequence of having violated the laws of war, and for the purpose of preventing hostilities, be liberated from confinement without having been indicted by a grand jury, it does not follow therefrom that he has committed no crime. He may have been guilty of grave offences, while the government may not have deemed it necessary to prosecute him. Clemency and forbearance are not a just foundation for a claim of indemnity. An offender may not have been indicted, because the crime committed, being purely a military crime, or a crime against martial law, may not have come within the jurisdiction of civil tribunals. In such a case, the arrest and imprisonment, founded on martial law, justified by military necessity, cannot be adjudicated by civil tribunals. If the person so arrested is the subject of a foreign power, and claims exemption from arrest and custody for that reason, he can have no right to indemnity under any circumstances by reason of being an alien, until the fact of his alienage is made known to the government.

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His claim to indemnity thereafter will depend on a just application of the principles already stated." *

When a claim of a foreigner is presented for examination, it may be found useful to make investigation upon the following questions: —

1. What is the proof that the claimant is, in fact, an alien?

2. Was the injury complained of caused by the warlike operations of the Union army or navy?

3. Whether he has given any aid and comfort to the enemy?

4. Whether he has been naturalized, or has taken the initial steps for that purpose? †

5. Whether he has exercised the elective franchise in any State, or in the United States?

6. Whether he has acquired a *domicile* in the Confederate States?

7. If not, whether he had a temporary residence there, and whether he withdrew himself and his property, or attempted to do so, within reasonable time? And if he failed to do so, whether his failure was caused by the act of the United States, or of those acting by authority thereof?

8. Whether he had a *mercantile domicile*, or a *house of trade*, in the enemy's country?

9. Whether the property claimed was the produce of land owned by the claimant in the hostile districts?

* Military Arrests, pp. 211, 212, 10th edition. See Opinion, No. 357, in the case of Captain Sherwin, a subject of England, p. 365. Ibid., No. 362, in the case of Theodore Moreau, a subject of France, p. 368.

† By proclamation 8 May, 1863 President Lincoln disallowed the plea of alienage to all foreigners who were enrolled among the military forces of the United States, if they were of lawful age for such service, and had made the usual preliminary oaths for naturalization, and who should be found within the States after sixty days, or had exercised any political franchise under our laws.

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10. Has the claimant violated any law of the United States, having reference to his own conduct, or to the property in question?

11. Is there any treaty between the United States and the country to which the claimant owes allegiance, whereby the claimant's rights are excepted from the general law of nations and of war?

12. Is there any statute of the United States authorizing compensation to aliens for the injury complained of?

13. Is there any appropriation of money applicable by law to the satisfaction of the claim proposed?

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OPINIONS.

[THE following opinions, prepared by the author while Solicitor of the War Department, have been extracted from the records of his office, and are now added as illustrations of the application of some of the principles stated in the essay on War Claims.]

[No. 36.]

HARSBERG & STEIFEL,

Claimants for the value of 400 barrels of flour captured by our troops at Fredericksburg, and alleged to belong to that firm.

OPINION.

Military supplies, provisions, &c., have been frequently captured by our troops in insurrectionary districts, and used for the support of the army. Such supplies, whether the property of loyal men or of the enemy, are contraband of war, and are subject to lawful capture.

Whether the claimants, if loyal, are entitled to indemnity or not is not now material, because, no appropriation having been made by Congress for payment of such indemnity, this Department has no authority to allow or pay the same.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

April 20, 1863.

[No. 55.]

J. W. SEAVER,

Petitioner for an order allowing him to collect a debt of $32,000 from L. N. Lane, of New Orleans, a registered enemy of the United States.

OPINION.

The owner of the property comes within the provisions of the 6th and 7th sections of the Act of July 17, 1862, ch. 195.

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In this case, it is the duty of the President to seize such property, and by proceedings *in rem* to have it converted into money and paid over to the Treasurer of the United States.

There is no provision in the Act saving the rights of *creditors;* but *all* conveyances made against the express provisions of this Act are void in law. A conveyance such as is requested would be *void.* The Secretary has no power to set aside an Act of Congress, and cannot sanction such conveyance, however strong the equity of the case may be.

The precedent would be a dangerous one, even if the law would sanction it, as the door would be open to innumerable frauds and evasions of the confiscation laws.

The remedy of the petitioner is by application to Congress.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

March 6, 1863.

[No. 88.]

A. KERNAHAN.

The Hon. Secretary of State enclosed letter of Lord Lyons relative to the claim of A. Kernahan, a British subject, for property seized by order of General Butler.

MEMORANDUM.

Kernahan appears to have aided and abetted the enemy in several ways, and to have forfeited all claim to be treated as a neutral British subject.

(Signed) W. W.

[No. 95.]

Claim against Confiscated Property.

W. & C. K. HERRICK.

Claimants against the confiscated property of Bloomfield & Steel, of New Orleans.

OPINION.

I am not aware of any provision of the Statutes of the United States which would authorize you, as creditors of Bloomfield & Steel, to recover your claims from the United States out of the proceeds of the property of such debtors after it has been lawfully confiscated.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

April 18, 1863.

See letter to Herrick of April 18.

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[No. 117.]

CLAIM FOR CORN CONDEMNED.

Claim of H. H. Thompson for proceeds of 5607 bushels of corn condemned as lawful prize, and forfeited to the United States.

By Samuel H. Treat, District Judge, Southern District, Illinois.

Lawrence Weldon, Esq., District Attorney.

OPINION.

It appears from the papers in this case, that "in an expedition sent out through Southeastern Missouri, our troops captured a quantity of corn, as property of a rebel (one Shelby Thompson); that H. H. Thompson, the claimant, was captured as a rebel, having been caught near the same place in which the corn was seized, and which belonged to a relative of his, then in the rebel service.

The corn was appropriated, as is usual in such cases, to the use of the army. Subsequently, on the 22d October, 1861, an information appears to have been filed, in the District Court of the United States for the Southern District of Illinois, against this corn, by Lawrence Weldon, District Attorney of the United States for that district; and it appears that the Marshal of the United States had attached 5607 bushels of corn (presumed to be the same), upon process issued in pursuance of said libel.

How the corn came to be removed from Missouri into Illinois does not appear; but it is probable that it was transported thither by the captors, and was used by them as part of their military supplies.

The legal proceedings in this case are presumed to have been instituted under the provisions of the "Act to confiscate property used for insurrectionary purposes," approved August 6, 1861.

Whether the property captured came within the provisions of that Act is not shown upon the evidence, as it does not appear that the owner of the corn, though himself a rebel, purchased, sold, kept, used or employed it for the purpose of aiding the rebellion, or the rebels.

It appears that the corn was found on the farm where it was or might have been raised, and for all that appears, it may have been the intention of the owner to prevent its being used by rebels, or in aid of the rebellion.

That the property was lawfully captured, on other grounds and by other authority than that claimed in this statute, is not material to the rights of this claimant, who can maintain his claim only under this statute.

The next question is as to the claim of H. H. Thompson.

He was arrested as a rebel, but, though discharged, there is no evidence of his loyalty.

The information was filed by the United States Attorney, in accordance

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with the 3d section of the Act above cited, which provides, "That the Attorney-General, or any District Attorney of the United States in which said property may at the time be, *may institute the proceedings of condemnation, and in such case they shall be wholly for the benefit of the United States.* Or any person may file an information with such Attorney, in which case the proceedings shall be for the use of such informer and the United States in equal parts."

There is no provision in this Act for the substitution of an informer for the Attorney of the United States after an information has been filed, and *a fortiori* after condemnation.

The Attorney of the United States must be presumed to have intended to perform his official duty in filing the information as required by law. By what right, after condemnation, the Court, or Attorney of the United States, have allowed a *new party* to be introduced into the record, and thereby to allow him to deprive the United States of one half of the value of the property captured and condemned, does not appear; and when it is more than suspicious that the claimant is himself disloyal, the whole transaction is such as to require explanation on the part of the presiding Judge and the Attorney for the United States.

It is obvious that when enemy's property is captured on land, the title of the United States thereto is completed by capture itself, without legal proceedings. This is a well-settled principle of international belligerent law, and is applicable to a civil war such as now exists. If the army could not use military supplies captured from the enemy until after legal condemnation thereof, one of the most effective means of war would be lost, viz., the right to subsist upon the enemy. The power of the Union would be crippled by such legal entanglements. But in fact, the government is in the lawful exercise of full belligerent rights against those sections of country which are in rebellion; and of those rights, none are more unquestionable than that of acquiring legal title to enemy's property on land, by capture, without judicial proceedings.

The object and purpose of the statute of August 6, 1861, which was passed near the commencement of hostilities, was not to deprive the country of its belligerent rights, but to render liable to capture and prize certain classes of property owned by persons who should buy, sell, or hold it, or allow its use with an intent to aid the rebellion thereby, wherever such property might be found. This statute was only a step towards the application of belligerent law — a precautionary or preventive act calculated to deprive the enemy of such things as were likely to be applied to their use in carrying on war.

If such property be seized by the *civil* authority, *as by the Marshal of the United States*, there would be great propriety in requiring it to be condemned by civil tribunals, as title would not otherwise pass; but it cannot be deemed requisite that after lawful capture has been made by military

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forces in the army, the civil authorities should *recapture* it, or, in the words of the statute, "That it shall be the duty of the President to cause the same to be *seized, confiscated,* and CONDEMNED."

If this view of the statute be erroneous, if all captures of personal property on land by military forces must also be seized by the Marshal, confiscated and condemned, then the President must commence a lawsuit every time a detachment of troops captures a gun, a bushel of corn, or a stack of forage from the enemy, and he must share the fruits of victory with an army of informers before he can feed his soldiers with the provisions they have captured. Such a mode of carrying on war is unheard of, and is impracticable.

As the title to the corn was perfect without the proceeding in Court, as above stated, it would seem that the institution thereof was unnecessary, and without justification. The only result or effect it could have was to make costs, and deprive the United States of that which was already legally and justly their own.

The claimant has been deprived of the expected fruits of his legal process; and if there were no other objection to his claim, there is no appropriation from which this Department would feel at liberty to pay the same.

It is recommended that payment be refused.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

April 24, 1863.

[No. 195.]

CROW, WYLIE, & CO.

The Secretary of State asks attention to the enclosed copy of a note from Lord Lyons relative to certain lumber at Pensacola, the property of Messrs. Crow, Wylie, & Co., of Liverpool, who desire to remove the same, it having been bought before the outbreak of the war and the establishment of the blockade.

OPINION.

There is not sufficient or satisfactory evidence that the title to the lumber, &c., was, at the time when hostilities commenced, legally vested, in part or in whole, in the claimants.

There was an efficient blockade upon Pensacola before any attempt to export said timber, &c., was made by or for said claimants, of which they had notice, and which still remains in force.

For these and other reasons, I recommend that this Department decline to interfere in relation to the claim of Messrs. Crow, Wylie, & Co.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

May 28, 1863.

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[No. 332.]

Claim for Seized Property.

MRS. EUGENIA P. BASS.

Claimant for property taken by the United States army from her plantation in Mississippi, for the public service.

OPINION.

Mrs. Eugenia P. Bass, claimant against the United States for property alleged to have been taken by the forces of the United States from her plantation in Mississippi, in February and April, 1863.

The only evidence offered in support of the claim of Mrs. Bass is her own affidavits, in which she testifies to her belief of facts of which she has been informed.

From this testimony, it would appear that the forces of the United States have captured certain mules, oxen, beef cattle, bacon, chickens, potatoes, wines, sheep, horses, cotton, &c., in the months of February and April, 1863, from the plantation of the claimant in the State of Mississippi.

That this property was captured, would appear probable from the fact that receipts were demanded, as the claimant says, and were refused. The items charged are not known by the affiant to be correct, either as to quality, quantity or value of the things alleged to have been taken. Her testimony is in accordance with the best information she can obtain, as she alleges.

Her loyalty to the United States is averred, and in confirmation she produces a copy of an oath alleged by her to have been taken voluntarily and subscribed; and she also produces a certificate of permission given by General Grant to ship and sell certain cotton.

But the property captured had been seized in February and April, 1863, and the oath does not purport to have been taken until some weeks afterwards, viz., May 22, 1863.

The permission of General Grant was dated September, 1863; and hence it is obvious that neither the oath nor the permission proves the loyalty of the claimant in the preceding period of February and April. The oath merely pledges Mrs. Bass to loyalty from and after the date thereof, but does not allege that she had been loyal previously, nor that she had taken no part with the rebels prior to that time. It may have been sincerely taken, pledging her future loyalty, with a view to recover the property which had been previously captured.

In relation to the permission given by General Grant to the claimant to sell cotton she then had, no evidence is offered to show what representations were made to him, whereby that permit was issued, nor is it probable that he intended to have such permit used as evidence to sustain the present claim.

No report has been asked for or obtained from the military authorities

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by whom the capture is alleged to have been made, and it would be impracticable to protect the rights of the government if this case were to be adjudicated on the evidence as it now stands.

If property of the character above named is seized by the forces of the United States in time of war in a belligerent district, it is a fair presumption that it has been lawfully captured. It is true that this presumption may be overcome by proof. But if property contraband of war has been captured in a district which is engaged in a territorial civil war against the United States, even if the owner of it is friendly to the United States, and if he has taken no part in the rebellion, I am not prepared to say that he has any legal claim for indemnity therefor, without further legislation by Congress. Congress has, as yet, made no appropriation for payment of such claims.

For the reasons therefore,

1. That the proof of quality, quantity, and ownership of the property in question is insufficient;

2. That the loyalty of the claimant at the time the property was taken is not sufficiently proved;

3. That if these two points were established, there will still be no legal claim for indemnity for property contraband of war captured in a belligerent district;

4. And that there is no appropriation in this Department which can be applied to the liquidation of such claims, —

I recommend that the claim of Mrs. Bass be not allowed.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

[No. 361.]

INDEMNITY TO FRENCH SUBJECTS.

The Secretary of State forwards a translation of a communication of Viscount Treilhard, who writes on behalf of the French Minister respecting the claims of some French residents of New Orleans, from whom the Federal authorities are alleged to have forcibly taken arms which have not been paid for.

OPINION.

The communication addressed to the Secretary of State from the Legation of France, asking attention to the claims of certain French residents of New Orleans, has received a careful examination. The statements of loss, and consequent claims, are preferred by four persons, viz.: —

1. Pierre Mattie.
2. A. Chièvre.
3. B. Phillipe, and
4. J. Gilbaux.

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From the report of the Provost Marshal-General in New Orleans, it appears that all the persons named above are unknown to the Consul of France at New Orleans, and that in the cases of Mattie, Chievre, and Phillipe, no evidence has been produced, or could be procured, either of the identity, citizenship, conduct, or losses of these persons. I cannot, therefore, recommend any action in regard to them at the present time, and in the present state of the proofs.

In regard to the case of J. Gilbaux, it appears from the evidence and papers submitted that the articles taken from his shop on the 17th May, 1862, were contraband of war, and intended in part for the equipment of a Confederate battery; that he had been engaged in making up and furnishing to the Confederates, goods of a similar character, down to the time of the occupation of New Orleans by the forces of the United States; that the goods taken from his shop, as above stated, were, in part at least, used for the equipment and service of cavalry of the United States; and further, that the whole value of the goods so taken, instead of being about nine thousand dollars, as represented by said claimant, would not be much, if any, in excess of two hundred dollars.

There is no proof of the nationality of the claimant, or that the goods taken were his property, and he seems to have forfeited any right that he might otherwise have had to favorable consideration as a French citizen, by violation of his duty as a neutral, and by aiding the rebellion. I would say, also, that even if the results of further inquiries should be favorable to the several claimants above named, this Department would be unable to satisfy those claims, as there is now no appropriation in its control from which they could lawfully be paid.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

December 5, 1863.

[No. 357.]

CAPTAIN SHERWIN.

The Secretary of State, June 10, 1863, addressed a letter to the Secretary of War, requesting the opinion of the Solicitor of the War Department in reference to a reply to Lord Lyons's note of May 27, in relation to the case of Captain Sherwin.

On the 1st of July, 1863, Mr. Whiting submitted to the Secretary of State his views on the subject in an opinion *in extenso*, which is on record.

On the 11th of November, 1863, the Secretary of State communicated a copy of a note from Lord Lyons, in which he renews the demand for adequate compensation in the case of Captain Sherwin, and suggests its reference to Mr. Whiting for examination.

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WAR DEPARTMENT, SOLICITOR'S OFFICE.
WASHINGTON, D. C., July 1, 1863.

The Hon. WILLIAM H. SEWARD,
Secretary of State.

SIR: The letter addressed by you to the Hon. Edwin M. Stanton, Secretary of War, dated June 10, 1863, has been referred to me, in which you did me the honor to request any suggestions that might occur to the Solicitor of the War Department, with a view of answering Lord Lyons's note of the 27th ultimo, in relation to the case of Captain Sherwin, an alleged British subject.

The pressure of other engagements has prevented an earlier reply. I now submit, with great deference and respect, the following memoranda for your consideration.

I have the honor to be, sir,
Your obedient servant,
(Signed) WILLIAM WHITING,
Solicitor of the War Department.

A claim against the government of the United States having been made by Her Majesty's government, in behalf of Captain John Sherwin, an alleged British subject, for damages suffered by him in consequence of an arrest and detention by military authority, in a time of active hostilities, during a rebellion involving a large portion of the inhabitants of this country, and there being no question of the fact that such arrest and imprisonment were so made, and that he was discharged therefrom without being held to answer over to any indictment of a grand jury, and that such imprisonment was, to a certain extent, injurious to him, the question remaining to be determined is, whether he is entitled, through the agency of Her Majesty's government, to claim indemnity from the United States.

To establish such claim, Captain Sherwin must offer reasonable proof that he was, at the time of his arrest, a British subject.

In recurring to the evidence on that point, it will be observed that there is no allegation in the letter of the Hon. William Stewart to the Hon. William H. Seward, Secretary of State, that Captain Sherwin was, or ever had been, a British subject.

An examination of the correspondence will show that it was not until the 27th of May, 1863, and in the letter of Lord Lyons of that date, that the fact of Captain Sherwin's citizenship for the first time appeared to be assumed or taken as true.

In addition to this circumstance, which, doubtless, may be attributable to accidental oversight, no evidence is offered of the clearances or other papers connected with the voyage of the Rowena, and of the Dixie, in which Captain Sherwin had sailed, being American ships trading with

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American ports, whereby he might show whether he had or had not represented himself as a British subject.

The fact, however, on which much reliance is placed, making it more necessary that proof of nationality should be furnished, is this, namely: that at the time of his arrest, and during the whole period of his imprisonment, he did not make known to this government that he claimed to be a subject of Great Britain, and did not request his release on that ground. Supposing, however, proof should be satisfactory on that question, other facts must then be considered.

It appears from the evidence in the possession of the War Department, that Captain Sherwin, in the year 1862, was engaged in a clandestine and unlawful manner in taking on board of a ship, navigated by him and called the Dixie, and in transporting from Reedy Island, in Delaware River, certain persons whom he had reasonable cause to believe and to know were public enemies of the United States, for the purpose of enabling them to join those who were in arms against the government.

He left the port of Philadelphia without having obtained license to carry passengers; he reported to the revenue cutter which overhauled his vessel after leaving port, that he had no passenger on board; but after that time he took up five persons at the island aforesaid, who were notorious secessionists, and who had been secreted several days; carried them out of the country, and transferred them at sea to a vessel bound for Nassau, N. P., with a view of enabling them to join their confederates in the rebellious States, or, at least, with the intention of enabling them to escape the performance of their legal obligation to serve as a part of the forces of the United States in the present war, they being subject to be drafted therein according to law.

These proceedings were in direct violation of the laws of the United States and the Proclamation of the President, and were acts of hostility, according to the law martial.

Having arrived at Nassau, Captain Sherwin there sold his vessel, returned to Philadelphia, and purchased another vessel.

Under these circumstances there was good and reasonable cause known to the government for suspecting and believing that Captain John Sherwin was actively engaged in aiding and abetting public enemies of the United States to gain access to their allies, or at least to avoid a duty which they were, if loyal citizens, legally bound to perform, while at the same time he was violating the municipal laws thereof, in associating with those who were friendly to the insurgents, if not themselves active participants with them.

The nature of the cargo of the Rowena, her place of destination, taken in connection with the former voyage to Nassau, and the sale of his vessel in a port which has furnished shelter and protection to the armed cruisers of the secessionists, and is the chief nucleus to which those persons resort who violate the Proclamation of Her Majesty and the blockade of the southern coast of the United States; and the other features of Captain Sherwin's

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proposed expedition, so plainly indicated his intention of renewing his former offences, as to afford justifiable cause for the seizure of his vessel, and the arrest and detention of his person in time of civil war.

Under these circumstances, Captain Sherwin was arrested as a military prisoner, for the purpose of preventing him from continuing in hostile practices against the United States, and having been detained until it was believed that he might again be set at liberty without endangering the public safety, and that he would thereafter refrain from repeating his former offences, he was then discharged without punishment.

[No. 362.]

Indemnity to a French Subject.

THEODORE MOREAU.

The Secretary of State invites attention to the letter of the French Minister, relative to the complaint of Mons. Theodore Moreau, a French subject, tenant of one of the houses of Mr. Slidell, at New Orleans, who finds himself constrained, in consequence of the conscription law, to pay a second time to the Federal authorities, rents satisfied by him up to the expiration of his liability to Mr. Slidell.

OPINION.

In regard to the claim of Theodore Moreau, presented by the Minister of France to the Secretary of State, I have the honor to submit that, upon examination of the documents laid before me, I find the facts to be as follows: —

Theodore Moreau, a French citizen (and now resident in Paris), has through his agent, one Dumargeau, occupied for purposes of trade, a store in New Orleans, No. 36 St. Charles Street, belonging to Mr. John Slidell. This agent now complains that on the second day of July, he was compelled to pay to Captain McClure, Quarter-master in the service of the United States, the sum of $480, as rent for said property from November 1, 1862, to July 1, 1863, eight months, at the rate of $60 per month, "although he had a written lease" from Mr. Slidell "arranged for by notes."

He further alleges that he refused to pay this rent to the Quarter-master, when it was demanded, but was compelled to pay under protest, because his store was forcibly closed by military order. He does not allege any loss or damage arising from such closing.

This claim was referred to the general commanding the Department of the Gulf for examination, and the report made by his order shows that this property, No. 36 St. Charles Street, New Orleans, had been leased by Mr. John Slidell to Mr. T. Moreau for a term of years; that this term expired November 1, 1862, and that Captain McClure, Quarter-master then in charge,

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made a contract with Moreau's agent, Dumargeau, to let it to him at a reduced rate, viz., at $60 per month, instead of $150 per month, which had been the stipulated rent up to that time; that Moreau's agent occupied the premises from November 1, 1862, to July 1, 1863, in pursuance of the said contract. He was then called on to pay the rent for the eight months which had elapsed, viz., $480; but this he refused to do.

This refusal continuing, on the second day of July, the Quarter-master ordered the guard to close the store. This was done. On the third day of July Mr. Dumargeau, as Moreau's agent, paid the rent, and his store was again put in his possession without damage or loss.

It further appears from the report, that at or about the time of the expiration of the lease from Slidell to Moreau, viz., November 1, 1862, Captain McClure, the Quarter-master, having charge of the Property Department, had, under the order confiscating Slidell's property, received from his agent the lease referred to and several of the notes given by Moreau in advance payment for the rent of this and an adjoining property, amounting to $3125; and as Moreau remained in occupation of the premises, his agent was called on to pay these notes. He professed inability, "plead poverty," and the United States authorities, upon his paying $1500, gave him up the whole of the notes, amounting, as above stated, to $3125, thus releasing him from a binding pecuniary obligation to the extent of $1625. The Quarter-master then reduced his rent, which had been, for this property, $150 per month, to $60 per month; and it is the enforced payment of the eight months' rent at the reduced rate, of which he now complains.

The evidence shows further, that this Dumargeau was abusive and irritating in his language, denying the right of the United States authorities to collect the rent, and defying openly their power.

It is not claimed, on behalf of Moreau, that he has as yet been compelled to pay double rent to any one, and he shows no pecuniary damage.

On the contrary, it does appear that his notes to the amount of $1625 have been surrendered to him without payment; and his rent for a period of eight months has been reduced from $150 to $60 per month, being a saving of $720 additional.

It may be remarked that Mr. Dumargeau alleges that this lease extended to October, 1863, but Captain McClure states positively that it expired November 1, 1862, and that the lease itself was given to him by Slidell's agent. Even if the term specified in the lease had not expired, Moreau's agent — by contracting with Captain McClure, paying him $1500 for the notes, and receiving a surrender of the balance of $1625, and entering into a new contract to pay to the United States $60 per month — has lost any right that he might have had under the original lease, even if his own statement of the time be true.

Mr Dumargeau further complains that the rents of certain parts of this

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same property — which had been underlet by him, and for which, under protest, as above stated, he has now paid the rent to the United States — have been collected by the Quarter-master, from the under-tenants, and that thus the United States government had been in receipt of double rent; but he does not allege that he, or his principal, has suffered any loss of rent due, or that any under-tenant has refused to pay him what rents might be lawfully demanded.

No evidence is adduced, on the part of Moreau, to support this last complaint, except the written statement, not under oath, of the agent, Dumargeau. And these allegations are fully disproved by the report and official statement of Captain McClure, the Quarter-master in charge.

From the foregoing statement, it appears that Slidell, the lessor, a well-known traitor, now residing in France, and engaged in open hostilities against the United States, is the owner of the property in question; that it has been seized, and is now held, as enemy property by our military forces; that the said real estate had been leased by Slidell to Theodore Moreau; that Moreau had given Slidell his notes in advance, for payment, or security for the payment, of the rent; that the lease expired November 1, 1862, and that thereupon all right of said lessee ceased, and the occupant became tenant under the United States.

A part of the notes aforesaid, amounting to the sum of $3125, have been taken into the possession of the United States and surrendered to the lessee, without even making a payment of more than one half the amount thereof: so that while he, on his part, has enjoyed the full consideration of the bargain, he has not performed the corresponding obligation to pay the notes.

It appears distinctly that Mr. Moreau has not been called upon to pay his notes a second time to the Federal authorities, but on the contrary, as above stated, has been relieved from payment of a considerable proportion of the sum for which he had given his obligation to Mr. Slidell.

The hardship, if any, exists on the part of the United States, who have not received the full value of the rents due to them. Since the lease expired, the occupant, having become tenant to the United States directly, cannot complain that he is required to pay rent. Still less is such complaint well founded, if it be considered that the amount paid by him is much less than what he was to pay under the lease, and that his liability to pay anything could have been avoided by him, by giving up the premises to their rightful owner, the government of the United States.

I therefore have the honor to recommend that no allowance should be made to the applicant.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

December 3, 1863.

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[No. 369.]

Claim for Cotton seized.

SIMON QUEYROUSE,

A French subject, claims pay for fifty-six bales of cotton taken from him by the United States.

OPINION.

The memorial of Simon Queyrouse shows that he was, in September, 1862, an alien resident in New Orleans, within the lines of the United States army; that at some time previous he had purchased of one Lestrapes, resident within the rebel lines, fifty bales of cotton; that this cotton was then stored in the enemy's country.

In May, 1863, these fifty bales, with six others, were captured by the United States forces under command of Major-General Banks.

There is thus disclosed a case of apparently unauthorized trading with the enemy, contrary to the Proclamation of the President issued August 16, 1861; and by virtue of that Proclamation this merchandise, if brought within States not in insurrection, or if captured, would be forfeited.

Under the Act approved March 12, 1863, and the orders of the Secretary of War made in pursuance thereof, captured property is to be turned over to the special agents appointed by the Secretary of the Treasury, to be disposed of by them according to law. The capture complained of by Mr. Queyrouse was made since the passage of this Act.

I cannot advise, therefore, that this Department interfere with the disposal of this cotton by the special agents of the Treasury Department, or sanction any claim for compensation for the property delivered, or to be delivered, to them.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

December 5, 1863.

[No. 410.]

Senate Resolution as to Enrolment of Slaves.

Enrolment of slaves in Maryland, Delaware, West Virginia, Kentucky, and Missouri.

Resolution of the Senate inquiring of the Secretary whether the slaves in the above States have been enrolled; and if not, why not?

Letter to the Senate, in answer to the resolution, prepared for the signature of Secretary of War December 31, 1863.

COPY OF LETTER.

. . . As the resolution is understood, "persons held to service or labor by the laws of Delaware, Maryland, West Virginia, Kentucky, and Missouri"

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are slaves still, under the personal control and possession of their masters, within either of the aforesaid States, under the laws thereof.

In answer to the inquiry of the resolution, the Secretary of War has the honor to inform the Senate that such slaves have not been enrolled among the military forces of the United States, under any provision of the "Act for enrolling and calling out the forces of the United States and for other purposes," approved on the 3d day of March, 1863.

In answer to the inquiry "why such enrolment has not been made?" the Secretary of War has the honor to say, that, in his opinion, the laws of the United States do not allow the enrolment and calling into service of slaves held in the actual possession of loyal persons, who, being citizens of the United States, are also citizens of and resident in either of the aforesaid States. Therefore such enrolment has not been made.

The Act of March 3, 1863, ch. 75, restricts the enrolment to able-bodied *citizens of the United States*, and persons of foreign birth who shall have declared on oath their intention to become citizens. The question whether there is any power to enroll slaves under the provisions of the laws as they now stand, depends on the construction given to the term "citizen of the United States." By the laws of each of the States named in the resolution, slaves are not citizens of such States, nor deemed to hold the rights of citizens of the United States.

By the opinion of the State Department, as stated in the letter of Mr. Thomas, then Secretary of State, to Mr. Rice, dated November 4, 1856, it was held, "that there can be no doubt that *negroes* are not citizens of the United States."

According to the opinion of the Hon. Edward Bates, Attorney-General of the United States, dated November 29, 1862, a *colored* man may be a citizen of the United States, and therefore competent to command an American vessel. But no opinion has been expressed by him whether slaves can or cannot be deemed citizens of the United States.

In the case of Dred Scott, heard before the Supreme Court of the United States in 1856, it was alleged that "Dred Scott was not a citizen of the State of Missouri, because he was a negro of African descent, his ancestors were of pure African blood, and were brought into the country and sold as negro slaves;" and on these facts, it was pleaded that the court below had no jurisdiction. The Supreme Court sustained the plea, and decided, "upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the constitution, and that the Circuit Court, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant (Scott) must consequently be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction." This decision applies to a colored person, who, having once been a slave, then claimed his freedom, but was denied the right to become a party before the court, because he was

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not, as the court held, a citizen of Missouri, and, therefore, not a citizen of the United States.

That decision has not yet been reversed; and if persons of African descent, being, or claiming to be, free, are not citizens of any States, nor of the United States, *à fortiori*, slaves of similar descent would not be construed by the same court as citizens of the United States, should any attempt be made to enroll them as such.

The laws of Congress also indicate that slaves within the loyal States were not intended to be enrolled in the forces of the United States.

The Act known as the Fugitive Slave Law, approved September 18, 1850, ch. 60, is still in force, whereby fugitive slaves, from either of the aforesaid loyal States, may be reclaimed; and though the military forces of the country are forbidden to do so, yet *peaceful citizens* are still bound by law to aid in a prompt and efficient execution of this slave law, by recapturing and returning fugitive slaves to their masters, whenever their services are required for that purpose.

This law still recognizes the right of the slave master to retain or to regain possession of his slave who attempts to escape from personal outrage, or through love of country, seeks to join the army of the Union.

The Act of 1862, approved April 16, for abolishing slavery in the District of Columbia, appropriated money to pay the claims of slave masters, thereby showing an intention, on the part of Congress, to recognize their right to compensation for the labor and service of slaves, when deprived thereof by law.

The Act of July 17, 1862, ch. 195, again recognized the right of such masters as had been loyal, had not borne arms against the United States, or given aid and comfort to the enemy, to regain their escaped slaves.

These Acts have not been repealed. They are inconsistent with the treatment of slaves in loyal States, as citizens of the United States, required to be enrolled under the Act of 1863.

The Proclamations of the President have forborne to call upon slaves of loyal masters in loyal States, for military service, without the assent of such masters. Taking into view, therefore, the authoritative decision of the Supreme Court, the legislation of Congress, conservative of the alleged rights of loyal slave owners, and the previous action of the Executive, the Secretary of War has felt constrained to forbear to enroll slaves in the military forces under the provisions of the Act of 1863.

That the government has the right to call into military service every subject owing it allegiance, whether citizen of the United States or not, whether bond or free, it is not supposed that any loyal man can reasonably doubt; and if it be the will of Congress, it has the power to exercise that right, and, doubtless, will pass such laws as it may deem proper in the present condition of public affairs.

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[No. 433.]

ALIENAGE.

How does service in the Federal or Rebel army affect the plea of alienage?

J. H. Foster, Paymaster, Twenty-second District, Pennsylvania, reports two cases, in one of which he has received instructions that service in the rebel army does not deprive a man of the right to exemption on the plea of alienage; while in the other he is told that service in the Federal army does deprive him of that right, and he asks how the Board should act on these cases.

Opinion.

Service in the rebel army, by an alien, does not make him a citizen of the United States, nor deprive him of the benefit of the plea of alienage against any claim of this government for military service. The volunteering of an alien in the army of the United States, to serve for a given period, subjects him to all the rules and regulations of the military service, during the term of his enlistment. After his contract of enlistment has expired, he still has the rights of alienage, as against the United States.

The Proclamation of the Queen gives the United States no rights over British subjects, though its violation subjects them to the penalties of British laws, and to the laws of war.

(Signed) William Whiting,
Solicitor of the War Department.

[No. 448.]

ALIENAGE.

Colonel Fry, Provost Marshal-General, submits the case of two deserters from a French corvette, who have enlisted in the United States service as substitutes, and who are claimed by the French consul as French subjects, and deserters from the French service.

Opinion.

Aliens, who are subjects of a foreign government, having voluntarily enlisted in the service of the United States, as substitutes for drafted men, are not entitled to be discharged from such service by reason of alienage; but may, under the law of nations, be held to perform their engagements, without giving the government to whom their allegiance is due just cause of complaint.

(Signed) William Whiting,
Solicitor of the War Department.

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[No. 467, *a.*]

OPINION

As to the proper course to be taken in behalf of soldiers who *shot deserters.*

LETTER AND ANSWER.

WASHINGTON CITY,
March 12, 1864.

Hon. WILLIAM WHITING,
Solicitor of War Department.

DEAR SIR: I have just received a letter from Thomas Wilson, Esq., Attorney at Law, Davenport, Iowa, from which I make the following extracts: —

"You remember the men (soldiers) who shot the colored man in Davenport on December 25, 1863. I. W. Stewart and myself are for the defence. Frazer (the corporal) pleaded guilty of assault and battery, and got thirty days in jail. Knapp, Company H., Fifth Iowa Infantry, who did the shooting, has a change of venue to Clinton county. Court commences to-morrow (March 6), and the trial will possibly commence on March 19. These men were *soldiers actually on duty*, as Provost Guard from Camp McClellan. Frazer was the corporal in *command, and commanded the arrest, and in making the arrest* the shooting occurred. This would be a good defence in Knapp's case *before a military court*, but not before a civil tribunal.

"We wish to get Knapp turned over to military authority, under section 30, Conscription Act, May 3, 1863, and to that end I have written (in Knapp's name) to General Sully, who refused to demand him from the civil authorities, and I sent the communication to the Adjutant General United States Army.

"I then made the same demand on Lieutenant-Colonel Greer, who transmitted it direct to Adjutant-General United States Army, *both* asking opinion of the Solicitor, Mr. Whiting, of said section 30. Three weeks have passed, and we have not heard from it. If two weeks more pass, he will have been tried and *convicted* by civil court.

"Will you be kind enough to see Mr. Solicitor Whiting, if he has received the communications, and will answer.

"The legal proposition is this: —

"*If a soldier in the United States service, amenable to the articles of war, engaged in performance of actual duty, under the command of an officer, commits one of the crimes, say murder, mentioned in section* 30, *in the State of Iowa, and does it by the express command of his officer, will he be taken and tried by a military court, under the provisions of said section* 30, *or will he be allowed to remain in the hands of the civil authority?*

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"Mr. Solicitor Whiting has published a small book, being his opinions on military arrests. It has some good authorities for us; will you be kind enough to obtain a copy for us, to be used on the trial, and send to me."

An early answer to the foregoing will much oblige,

Very truly yours, &c.,

(Signed) H. PRICE.

WAR DEPARTMENT, SOLICITOR'S OFFICE,
WASHINGTON, D. C., March 14, 1864.

H. PRICE, Esq.

DEAR SIR: Yours of the 12th instant has been received, containing extracts from letter of Thomas Wilson, Esq., of Davenport, Iowa, inquiring, "If a soldier in the United States service, amenable to articles of war, engaged in performance of actual duty, under the command of an officer, commits one of the crimes, say murder, mentioned in section 30, in the State of Iowa, and does it by the express command of his officer, will he be taken and tried by a military court, under the provisions of said section 30, or will he be allowed to remain in the hands of civil authority?"

In answer to this, and other inquiries contained in your letter, I have the honor to reply, —

That the 30th section of the Act of March 3, 1863, ch. 81, gives jurisdiction to general courts martial and military commissions, over persons in the military service of the United States, who, being subject to the articles of war, shall have committed in time of war, insurrection, or rebellion, either of the crimes therein enumerated, including the crime of murder. But this jurisdiction is not exclusive of, but is concurrent with, that of civil tribunals.

Under the fifth amendment to the Constitution, no person shall "be subject, for the same offence, to be twice put in jeopardy of life or limb." Therefore, no person can be lawfully condemned by any court, military or civil, for a crime of which he has previously been convicted or acquitted by a court having jurisdiction of the person and of the offence. Where courts have concurrent, but not exclusive jurisdiction, that court which first gains jurisdiction, excludes all others therefrom.

If a soldier in service, accused of "murder," is first indicted and arrested by the proper civil authorities of Iowa, they exclude the jurisdiction of the military courts over that crime; so if the soldier had been arrested for trial for that offence by a court-martial, the civil tribunals would have no right to interfere. It is not doubted that in time of war, military necessity will, under certain circumstances, justify the interruption of all proceedings by courts of law, which may in any way burden, impede, or oppose military movements, or aid and comfort the enemy. Nor is it doubted that, without the assent of military authorities, no civil court, or other civil authority of any State, can subject soldiers, in the service of the United States, to

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their commands, or can in any other way interfere with the strict performance of their military duties.

But when the commander of a Department finds it not incompatible with his military duties to permit the soldier to be tried by civil courts, he usually does so, out of respect to local authorities, and with a view of interfering as little as possible with the ordinary course of the administration of justice.

It is obvious that there ought to be some way by which, in all cases, officers who have committed homicides, or other acts of violence, in the discharge of their duties, should be protected under the law; and some procedures by which the same rules of law should be applied in all parts of the country.

It would be discreditable to the administration of justice if the same act should be pronounced a crime in one State, and a justifiable act of duty in another. Hence there ought to be some mode of applying uniform rules of law, by one tribunal, to all like cases, wherever they arise.

This purpose has been effected by the 5th section of the Act of March 3, 1863, ch. 81, which provides for the removal of all actions, civil or criminal, commenced in any State court, against any person, for any arrest or imprisonment made, or other trespasses or *wrongs* done or *committed*, or any act omitted to be done, at any time during the present rebellion, by virtue or under any color of any authority derived from or exercised by the President of the United States, or any Act of Congress, and this section prescribes also the proceedings for such removal, and forbids proceedings in the case by State courts after such removal, and transfers them to the courts of the United States.

The 6th section removes, in cases of error, the final decisions to the Supreme Court of the United States.

Therefore, while civil courts are allowed to retain concurrent jurisdiction of persons in the service, who have committed crimes punishable by military tribunals, the accused are thus made certain of securing impartial justice, administered under uniform rules, and are freed from the dangers of prejudice, by excitement of local juries, or by the errors of hostile or uninformed judges.

I recommend that the cases of the soldiers (who shot the deserter) should be removed from the State court of Iowa, to the United States Court, and that there should be, under the circumstances, no interference with the civil tribunals by military authority.

This recommendation is made, not because I have any want of respect or confidence in the eminent judge before whom the case is pending, but because it is desirable that the practice should be uniform.

I forward herewith some copies of the Essay on Military Arrests, and I trust that they will indicate the grounds of defence which will be of avail to the accused.

Very respectfully,

Your obedient servant,

(Signed) WILLIAM WHITING,

48 *Solicitor of the War Department.*

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[No. 487.]

Claims for Cotton seized.

W. W. CONES.

A number of claims for cotton seized and sold at Memphis, Tennessee, presented by Mix & Co.

OPINION.

The claim of W. W. Cones, referred to me, is for the proceeds of 252 bales of cotton seized by the forces of the United States in December, 1862, in La Fayette county, in the northern part of the State of Mississippi, transported thence to Memphis, Tennessee, and there, by order of General Grant, sold at auction, for the benefit of the United States, at 80½ cents per pound.

The net proceeds of sale were paid over by the Rental Officer to the Quarter-master's Department.

Mr. Cones has never been in possession of the cotton, but alleges that he had a good title by lawful purchase from loyal owners, within the lines of trade, established by law under the Regulations of the Treasury.

In support of this title, he produced copies of certain documents, of licenses issued to him to buy cotton, of agreements for sales of cotton made by one Denton, professing to be an agent of Cones, of bills of sale receipted, of certificates, letters, &c., — of all of which the originals should be required if the claim be further urged.

Dealing, however, with these copies as if they had been originals, Mr. Cones has not presented evidence sufficient to maintain his claim.

1. It does not appear that the agent, Denton, with whom the contracts relied on were made, had authority from the original owners of the cotton to make sales of it, at any time previous to its seizure by the United States.

2. It does not appear that Cones, on his part, had the right to exercise the privilege of trading under a Treasury license, by means of an agent or agents. This privilege was personal, granted to him because he was supposed to be a loyal, discreet, and honest man, and it could not be exercised at his pleasure, by deputies of any character, or in any numbers, unknown to the Treasury Department.*

3. It does not appear that, at the date of the contract, W. A. Thornburgh, who undertook to act in Cone's behalf, had, in fact, been authorized by him to purchase cotton under his license.

4. It does not appear that the cotton itself was, at the time of the alleged purchase, within the lines of the army of the United States, as established by the order of Major-General Grant; but it is probable, upon the evidence, that it was without — south of, and beyond, those lines; and therefore not the subject of lawful trade between loyal citizens and public enemies.

5. It does not appear that the cotton had not been actually seized by the United States troops, when Denton, as agent of the planters, undertook to

* See Ouachita case, 6 Wallace, ; *McKee* v. *United States*, 9 Wallace, 166.

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sell it. The precise time of seizure is not stated; but the evidence tends strongly to show that the seizure preceded the attempted sale. If so, the claim now presented cannot be maintained.

6. The alleged payment by Cones of the agreed price, twenty-five cents per pound, to the agent of the planters, is not sufficiently proved; but if made, it gave Cones no title to the cotton, if he had not a valid one before.

It was made voluntarily, with full knowledge of the facts that the planters could not perform their part of the contract, and that the cotton had been seized and ordered to be sold, by the highest military authority in that Department. If Cones paid *in his own wrong*, he must look for reimbursement to the parties who received his money, and not to the United States.

7. If the character of the several planters by whom the cotton was raised and for whom it was sold, be considered, the proof of their loyalty is not sufficient; indeed, it is admitted that two of them were in the rebel army.

I recommend, therefore, that no action be taken by this Department concerning this claim.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

October 1, 1864.

[No. 518.]

Draft of a Bill for Adjustment of the Claim of Aliens against the United States, arising since the War.

The Secretary of State submits to the Secretary of War, a Bill for the above purpose, for suggestion and amendment.

OPINION.

I have the honor to report that the Bill was framed by me, at the request of the Hon. Mr. Seward, aided by suggestions from him, and improved by one or two amendments subsequently made by him, and it appears to me to be carefully considered, and well calculated to answer the purposes for which it was drawn.

I had supposed that the Secretary of State would take occasion to confer personally with you upon the question of the expediency of adopting this, or any other plan, at the present time, for establishing a tribunal with power to adjust foreign claims. That conference not having as yet occurred, I deem it my duty to suggest, for your consideration, the questions, —

1. Whether it is expedient to inaugurate a system providing for the adjustment and payment of foreign claimants, prior to, and independent of, any measures of legislation looking to the settlement of claims of our own citizens.

2. Whether it will be profitable to protect the interests of the United

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States by referring claims arising out of the conduct of our military operations, to a tribunal which, being totally disconnected from, and independent of the War Department, cannot have such knowledge of facts or of the means of obtaining them, as will be absolutely necessary to protect the interests of the United States in controversies of this character.

Claims will be brought before these commissioners whose sessions may be in places remote from Washington. The War Department may have no knowledge of such claims, and, having no responsibility, will have no occasion to require them to be investigated by its officers; so that vast amounts may be awarded against the government, by default of proofs, and the facts in defence may be known only to those military officers who took part in making the seizures complained of.

These and other similar objections will, I doubt not, be weighed by you and by the Secretary of State. I have thought it proper merely to call attention to them.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

April 18, 1864.

[The draft of the bill above referred to was presented in the Senate, and referred to a committee; but its action upon the subject was designedly postponed.]

[No. 528.]

Liability of Navy Agents, &c., to Trial by Courts-Martial.

The Secretary of the Navy, by G. V. Fox, his Assistant, submits to the Solicitor of the War Department the following question: Whether navy agents, naval storekeepers, and the clerks of naval storekeepers, "delivering certificate vouchers, or receipts, without having full knowledge of the truth of the facts stated therein, and with intent to cheat, defraud, or injure the United States," are subject under the Act (of March 2, 1863), or any other act, to the rules and regulations made for the government of the military and naval forces, and whether they are subject to trial by courts-martial?

OPINION.

The first section of the Act passed March 2, 1863, refers to persons in the land or naval forces of the United States, or in the "militia in actual service." The navy agents, storekeepers, and their clerks, belong to, or are classed with the civil establishment at the navy yards and stations, having specific duties assigned them of a clerical or administrative nature, to be performed on land, under instructions from the Secretary of the Navy, as prescribed by statutes; and being without rank or command over enlisted men, and not being enlisted as in the naval service, are not held by law as part of the naval forces, and therefore are not, under the Act of

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1863 referred to, or under any other statute known to me, liable to trial by a court-martial for the offences specified.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

April 22, 1864.

[No. 531.]

Coin on the Person of a Public Enemy on Land, its Liability to Capture.

William Price, Esq., United States District Attorney, Baltimore, writes to Mr. Whiting, enclosing an opinion of Judge Giles, upon the right of the government to condemn money as enemy's property, when taken from the person of an enemy on land, in our own territory. The Judge decides against the right. Mr. Price asks whether he shall take an appeal.

OPINION.

I have received your letter of the 22d instant, enclosing a copy of the decision of Judge Giles in the case of the United States *vs.* "A Canoe and certain Merchandise and Money," libelled in the District Court.

It appears that the specie found upon the person of the captured rebel is not regarded by Judge Giles as liable to condemnation, because the statutes referred to as those upon which the libel was brought, viz., the Acts of July 13, 1861, and May 20, 1862, do not provide for or authorize the seizure or confiscation of money, but only of merchandise, goods and chattels, and the vehicles conveying them.

The Act of July 17, 1862, is referred to by Judge Giles; but he says that the captured rebel is not "shown to have been engaged in armed rebellion," and that the present is not a proceeding under that Act.

The facts in the case are but briefly stated by Judge Giles; but enough, I think, appears, or may be fairly presumed from what is admitted, to make it advisable to institute some new proceeding, based upon the sixth and seventh sections of the Act of July 17, 1862, chapter 195, and also upon the 4th section of the Act of March 12, 1863, chapter 120.

That the owner of this gold was "aiding and abetting the rebellion," even if he was not actually "engaged in armed rebellion," can hardly be doubted when the facts connected with his capture are fairly considered; and this brings him within the terms of the Act of 1862.

It may be found, upon inquiry, that this gold was brought from one of the States declared in insurrection, into Maryland; and it is certain that the owner was not a Treasury agent, who alone under the statute of 1863, is authorized to bring such property across the lines, without a lawful clearance, and it is also certain that he had no such clearance. If, therefore, "property," as the term is used in the statute, includes *specie*, and if the

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gold in question was brought from Virginia, as may be presumed from the residence of the owner, if no evidence to the contrary be adduced, it is liable to condemnation under section 4 of the statute of 1863, chapter 120.

If these positions appear to you to be maintainable, and the money is still where Judge Giles ordered it to be placed, or where it can be reached by process, I would suggest the inquiry, whether it would not be well to take such course as will enable you to obtain the judgment of the court upon this view of the facts and law, either by filing a new libel, or otherwise, as you may find practicable and expedient.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

April 30, 1864.

[No. 532.]

Payment of Creditors' Claims out of Proceeds of Confiscated Property.

Messrs. McGraw and Wills, attorneys for the creditors of C. C. Spaulding, request payment of their claims out of the proceeds of property confiscated on account of his having been engaged in illegal traffic with the enemy.

OPINION.

When the property of public enemies, or of one who has given aid and comfort to public enemies, by engaging in illegal commerce with them, has been vested in the United States by capture, forfeiture, confiscation, or other process, military or judicial, there is no provision of martial or of municipal law by which the government is required or allowed to distribute the proceeds of that property among those who may have pecuniary claims against such enemies or such delinquents. The law requires such proceeds to be otherwise appropriated.

I therefore recommend the Secretary of War to decline action on the petition.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

May 4, 1864.

[See also, on the same subject, the case of Tracy Irwin & Co. No. 1437.]

[No. 535.]

JAMES SHEPPARD

Claims restoration of cotton and other property seized upon his two plantations near Pine Bluff, on the Arkansas River, by the forces of the United States as abandoned property, alleging that he has taken the oath of amnesty, and has always been a Union man, and that his plantations in Arkansas were not abandoned.

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OPINION.

The application of James Sheppard, lately resident in Henrico County, Va., for the restoration of certain bales of cotton claimed by him as the produce of his plantations in Arkansas, with indorsements filed by him in support of his claim, and also the application of W. P. Grace, heretofore referred to me, claiming the same cotton by purchase, are now returned, upon the application of the parties, for the reason that the property is now said to be in the possession of an agent of the Treasury, and one of the claimants wishes that it may be sold, and that his claims to the proceeds may be considered by the Treasury Department. To this course I see no objection, and recommend that these applications, and the accompanying documents, be accordingly transmitted to the proper officers of the Treasury.

In this, as in some similar cases, I have hesitated to express a definite opinion, in advance of the promulgation of some general rule or the adoption of some uniform policy on the part of the government of the United States in relation to property captured, destroyed or damaged in the States in rebellion, not wishing, on the one hand, to discourage persons who might be thought to have some equitable claims to a liberal or lenient treatment, if such should seem good to the general government, or, on the other hand, to put any obstacle, however slight, in the way of the exercise of the legal rights of the United States against their enemies, if the condition of the country during the war, or after its close, should render it advisable to insist upon the strict enforcement of those rights.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

August 5, 1864.

[No. 707.]

CLAIM FOR DAMAGE TO PROPERTY.

The Secretary of State encloses a copy of a communication from the British Minister, presenting the claim of *Mr. Timothy Dowling*, for damages done to his property in Vicksburg, Mississippi, by persons in the United States service.

OPINION.

I concur in the opinion of the Military Commission, which examined the case, that the government is not responsible for the damages claimed, though for reasons widely different from those stated by the Commission; I do not admit that, as an alien permanently resident in the United States, the complainant has any claim for indemnity for property used or injured in the prosecution of the war.

Whether a private claim exists against Major General Ord, and the officers

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under his command, as assumed in the finding of the Commission, it is not deemed proper to express an opinion.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

July 25, 1864.

[No. 713.]

OATH REQUIRED OF ALIENS.

The Hon. Secretary of State encloses a copy of a communication from the British Minister, relative to an objectionable oath exacted from foreigners in the Department of the Gulf.

OPINION.

The oath required of alien British subjects imposes, upon those who take it, a moral obligation to observe in good faith Her Majesty's proclamation of neutrality, and to do nothing directly or indirectly to aid and comfort the enemies of the United States, so long as Great Britain and the United States shall remain at peace.

To open to foreign commerce the port of New Orleans, during the progress of the civil war, was an act of national courtesy, which might lawfully have been withheld or refused.

Those who avail themselves of the act may justly be required to give to this government assurance of the sincerity of their neutrality; and they ought not to avail themselves of a privilege without abandoning any intention to use that privilege against the government which grants it.

Those aliens who intend to become enemies of the United States, in violation of Her Majesty's proclamation, and of the laws of nations, ought not to be permitted to enter any port of the United States while the war lasts.

Those who take the oath do not forfeit thereby any right guaranteed by the laws of England or by the laws of nations.

In any event, the privilege of commercial intercourse may, by the law of nations, be *restricted* in time of war by the United States, in such manner as public safety requires, and the required oath may be deemed one of those restrictions.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

July 26, 1864.

[No. 714.]

ROMAIN DUPRE.

The Hon. Secretary of State transmits a copy of a note from the Chargé d'Affaires of France, presenting the claim of Romain Dupré for six bales of cotton seized on his plantation in Placquemine, Louisiana, by Major Hamilton, of the One Hundred and Tenth New York Volunteers.

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OPINION.

1. It is not sufficiently shown that the claimant is a subject of France.

2. It is not shown that the claimant does not come within the provisions of the Act of February 24, 1864.

3. It is not shown that, as Dupré was a permanent resident of Louisiana, the property of the claimant is not liable to capture as that of a public enemy, he not having withdrawn from the country within a reasonable time after the war broke out.

With these views, the Department is not advised to act upon the present information.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

July 28, 1864.

[No. 723.]

GENERAL BANKS'S ORDER RESPECTING GOLD.

The Hon. Secretary of State encloses a copy of a communication from the British Minister relative to an order of the 18th ult., issued by Major General Banks, respecting gold, requiring it to be deposited under supervision of the military force of the United States.

OPINION.

The order of General Banks has been found necessary for the purpose of preventing imported gold from being used for the aid and comfort of the insurgents against the United States.

It is a matter of favor on the part of the United States, to open to foreign commerce any port which has been effectually blockaded, especially when the introduction of gold or of merchandise *may* be prejudicial to the interests of the country, by giving aid and comfort to its public enemy.

Commerce may be allowed, with or without restrictions, to the subjects of neutral countries in time of civil war, according to the necessities of the case, and certainly without infringement of any treaty between the United States and Great Britain.

It would be extraordinary if, in fact, the government which admits the importation of foreign gold only on condition that neutrals will not abuse a privilege extended to them in good faith, and in full reliance upon their neutrality, should be deprived of the power of taking proper precautions for the preservation of that good faith, and for its own protection against the misuse of that privilege.

All that is required of importers of gold is the temporary deposit of it in the Treasury, with the assurance that when withdrawn, it shall not be used illegally, or in violation of the neutral obligations of its owner.

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No good reason is presented why any *bona fide* neutral should object to this order.

But whether objected to or not, it is justifiable, because required in a civil war and under the peculiar circumstances of the Department in which New Orleans is situated, as a necessary safeguard over the privilege of commerce extended to foreign citizens at that port.

No elaborate argument is offered to vindicate the right of our government to make and enforce the order of General Banks, because such argument is not called for. Its reasonableness and necessity alone are shown, and furnish sufficient grounds for its justification.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

July 28, 1864.

[No. 730.]

JOHN H. SOTHORON'S CREDITORS.

OPINION.

In the matter of Benjamin Adams and others, alleged creditors of John H. Sothoron, referred to me, without date, it appears that Sothoron is the secession rebel who, with his son, murdered the lieutenant who was recruiting colored men on his farm, in St. Mary's County, Maryland, and fled to Richmond; that for these reasons his property was sequestered and used for the benefit of the United States.

It also appears that subsequent to such sequestration, attachments were issued, at the instance and for the benefit of the alleged creditors of Sothoron, by the Circuit Court of said County of St. Mary's — one of whom, the above-named Benjamin Adams, had violently taken sides with Sothoron.

They now claim that these attachments constitute a lien upon said property, entitled to priority, and that the decision of the judicial tribunal should prevail in their behalf, without prejudice from the acts of sequestration by the government of the United States.

In this state of facts, I am of the opinion, that,

1. One of the claimants is disloyal, if not an active enemy.

2. The appropriation of Sothoron's property in liquidating his debts, would enure to his benefit as effectually as restoration thereof to himself.

3. The sequestration, being commenced before the attachment, is, in any event, a prior lien, and proceedings under the same must take precedence.

4. The sequestration is a process authorized and required by the statute, and no provision is made by law for payment of creditors' claims out of the estate sequestered.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

July 26, 1864.

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[No. 731.]

ANTOINE CAIRE.

Claim for Cotton seized.

The Secretary of State, May 18, 1864, encloses a translation of a note from the French Minister, relative to a claim for one Antoine Caire, of New Orleans, for indemnity for 188 bales of cotton seized by Lieutenant-Colonel S. B. Holabird, in June, 1863.

Referred, July 21, 1864, to the Solicitor for opinion.

Opinion.

In the matter of Antoine Caire, an alleged French subject, referred to me on the 21st instant, for my opinion upon the validity of his claim presented through the Minister of France, for $43,261$\frac{42}{100}$, the estimated value of 188 bales of cotton said to have been purchased by him on the 7th April, 1862, of C. W. Allen, planter, residing in the Parish of Pointe Coupée, Louisiana, and taken from the plantation of said Allen by order of Colonel S. B. Holabird, Chief Quartermaster, and sold under his authority by Prize Commissioner George E. Tyler, at New Orleans, July 30, 1863, I am of the opinion,—

1. That it is not sufficiently proved that the claimant is a subject of France, the consular certificate, affirmed in his affidavit to be of registry at New Orleans, not being deemed conclusive proof, inasmuch as the character of evidence and the principles governing the consul as to the nationality of claimant, are not known to the Department, and cannot, therefore, be affirmed or denied.

2. It is not shown that the claimant does not come within the provisions of the Act of February 24, 1864.

3. The proof of ownership is not made out, and the sale may be not *bona fide*, as the terms of it and the papers which passed, are not produced.

4. The question whether this species of commerce is lawful, under the statutes of the United States, cannot be settled, on the facts stated, without further investigation.

5. It is not shown that the claimant was a resident of Louisiana; if he was, it does not appear whether, as such resident, his property is not liable to *capture*, as that of a public enemy, he not having withdrawn from the country within a reasonable time after the war broke out.

With these views, the Department is not advised to act on present information.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

July 22, 1864.

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[No. 935.]

CASE OF GEORGE CAMERON.

The Secretary of State, by letter to the Secretary of War, under date of October 6, 1864, refers to a note from the Department of State, of the 1st instant, and its accompaniments, relative to the case of George Cameron, now in "Prisoners' Camp" at Elmira; and encloses a copy of a note of the 21st ultimo, from J. Hume Bromly, Esquire, which represents that said Cameron was forced into the rebel service, under his written protest as a British subject; and proposes that a bond, with surety, be accepted from Cameron "that he will leave the country for Scotland, and not return to the South, or in any way aid the Confederates." (See 717.)

Received by the Solicitor, November 11, 1864.

Opinion.

George Cameron was captured as a prisoner of war, at Petersburg, in arms with the forces of the Confederates. He now asserts that he is a neutral British subject, and that he was forced into the rebel service against his will. His assertion is not accompanied by any proofs.

If Mr. Cameron was in fact a neutral British subject and denizen of the Confederate States, at the commencement of our civil war, he had a right to withdraw from the belligerent territory within a reasonable time, and would have preserved, by such withdrawal, his claim to be regarded as a neutral alien by the United States. Having voluntarily remained a denizen of the Confederate States, and having thereby subjected himself to the control of rebels in arms, claiming a *de facto* right to enforce their municipal law, he has lost his right to be treated by the United States as a subject of Her Majesty, not only by such voluntary continuance of residence, but by engaging in active hostilities, which he might have avoided by leaving the country in due season.

Being thus captured as a prisoner of war, he may be lawfully held or exchanged as such; but, as it appears from his own statement that he was forced into the rebel army against his will and against his written protest, and as he is willing to leave the United States to go to Scotland, not to return to any of the Confederate States, or in any wise to aid or abet the rebellion in the United States or elsewhere, and as he proposes to give security accordingly, I recommend that Mr. Cameron be discharged, provided that he shall first make it appear, upon satisfactory evidence, by affidavits or otherwise, that he is *bona fide* a British subject, and was compelled to take up arms on behalf of the rebels against his will, and under protest; and further, that he shall give his sworn parole not to aid or abet the rebellion in the United States or elsewhere, directly or indirectly, or any person or persons sympathizing therewith, and to proceed with reasonable despatch to Scotland,

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and not to return to any State in rebellion during the present war, and provided also that he shall give bond in the sum of fifteen thousand dollars, with two sureties, approved by the Attorney of the United States, in the Southern District of New York, for the faithful keeping of his parole.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

November 15, 1864.

[No. 951.]

Claim of Cowen & Dickinson for Indemnity for Two Hundred and Fifty-six (256) Bales of Cotton, taken by the United States Forces, for Use on the Fortifications at Knoxville, during the Siege of that City.

Referred to the Solicitor "for his opinion as to the validity of this claim against the United States; and also whether there be any existing appropriation out of which it can be paid."

November 30, 1864.

OPINION.

It is one of the belligerent rights of the army to capture, seize, and use in prosecution of the war, cotton, as well as any other personal property belonging to the inhabitants of districts which have been declared in rebellion by the Political Departments of this government.

The owners thereof, whether loyal or disloyal to the Union, are deemed in law as public enemies, and therefore they are not, by any existing statute, entitled to payment, at this time, for property so seized or captured. What provision, if any, shall hereafter be made for payment to those who, being loyal, shall have held themselves aloof from the rebellion, or to those who shall have supported the Union, must be hereafter determined by the government.

The facts in this case, as to the loyalty of Messrs. Cowen & Dickinson, and their alleged losses, and as to the actual disposition made of their cotton, are, upon the evidence, left somewhat in doubt; but if they were fully established, as stated, there is no statute of the United States, and no existing appropriation, by virtue of which their claim can now be paid.

I therefore recommend that this Department take no further action in regard to said claim.

(Signed) WILLIAM WHITING,
Solicitor of the War Department.

December 12, 1864.

[No. 1437.]

TRACY IRWIN & CO.

See No. 532.

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NOTES TO THE FORTY-THIRD EDITION.

[No. I.]

WAR POWERS.

War Powers under the Constitution used by the Government in suppressing the Rebellion, and recognized by the Judicial Department.

(1.) In case of insurrection, the President, as commander-in-chief of the army and navy (Const. Art. II. Sect. 2), may call into actual service the military and naval forces of the United States, in accordance with the laws of Congress (Const. Art. I. Sect. 8).

(2.) Congress may by law provide for raising forces by enlistments into the regular army and navy, or into the volunteer service of the United States, or by mustering into that service the militia of the several States, or by draft or conscription of all persons who are liable to do military duty.

(3.) If the insurrection shall be suppressed without a declaration or recognition of war, by the political departments of the government, the insurgents will retain their constitutional rights, privileges, and immunities as citizens of the United States, subject only to punishment for violation of municipal laws.

(4.) If the insurgents acquire firm, exclusive military possession and control over a district of the country, the government may declare or recognize a state of civil war, and may, thereupon, lawfully assume and enforce the rights of war against all the inhabitants of that district; and may treat them, individually or collectively, at its own will and pleasure, as subjects, or as belligerents; or it may concede to them certain belligerent rights and withhold others.

(5.) When a state of civil war is recognized or declared by the government, the *privilege* of the writ of *habeas corpus* may be wholly or partially suspended by acts of Congress. Martial law may be declared and enforced in certain districts and under certain circumstances. All communication with the belligerents may be suspended and made unlawful, whether for the purposes of commerce or otherwise, and many rights, privileges, and immu-

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nities guaranteed by the constitution to loyal citizens in time of peace may then be suspended by law without violating those guarantees.

(6.) Even if the government has declared or recognized a state of civil war, it is not, therefore, bound to concede or to use its belligerent rights; it may, at its discretion, treat its revolted subjects as insurgent criminals, who have incurred the penalties of municipal laws. In that case, they may be held liable under our statutes to trial and punishment for

(*a.*) Treason against the United States.

(*b.*) For misprision of treason.

(*c.*) For exciting, engaging in, or giving aid and comfort to the rebellion.

(*d.*) For violation of blockades or of non-intercourse acts; and,

(*e.*) For breach of other laws of the United States.

Such insurgents become also liable to the penalties of confiscation acts, and to arrest, capture, or imprisonment by our military forces during the war. If they have slain their enemy in battle, they are indictable for manslaughter or murder; if they have inflicted wounds upon him, they are subject to prosecution for assault with intent to kill. If, as seamen on board a rebel cruiser, they have attacked a United States vessel, they may be convicted of piracy. They are also responsible, individually, in *civil actions* for all damages inflicted by them upon the persons or property of other citizens. The fact that in violating laws they were acting under military orders of a *de facto* rebel government, then at war with ours, will not be a legal defence to such actions. They will also be amenable to all penal laws of Congress not prohibited by the constitution.

(7.) When the government, having recognized or declared any district of the country to be in the *status* of civil war, has determined to exercise its belligerent powers, it has the constitutional right to treat all the inhabitants of that district as *public enemies* of the United States, and to subject them to the rules of war. By acts of Congress it may forbid to such public enemies all intercourse between them and the people of the loyal states, and may repeal all laws by which seaports in rebel districts have been designated ports of entry under our revenue system. The President, as commander-in-chief of our military and naval forces, may declare and maintain blockades of enemy seaports under the law of nations.

(8.) The property of insurgents, recognized as public enemies, may be captured *on the ocean*, or on navigable waters, as prize of war, and may be condemned as such in our prize courts, their personal property on land may be *destroyed* by our military or naval forces, it may be used by the captors for war purposes, it may be seized and confiscated under confiscation acts, or it may be captured, and used or sold, or appropriated for the public benefit in any manner which may be provided for by laws of Congress, without indemnity. The slaves of public enemies may be captured and freed, or emancipated. Their lands situated within the jurisdiction of the United States may be seized and held, and used by the government during the war, or

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may be confiscated, and sold for the benefit of the United States, in accordance with the laws of Congress.

(9.) Our public enemies are subject to martial and military law. They may be captured as prisoners of war, or wounded, or slain in battle. They may be tried by courts martial, or by military commissions. They may be held, after active hostilities have ceased, as prisoners of war, as captives, or as a conquered people. They may be controlled by military governments, erected by the President, as commander-in-chief, while the war is flagrant; and, when hostilities have ceased, by military or civil governments, erected in accordance with the laws of Congress.

(10.) As public enemies, they are entitled only to the rights of war, and therefore hold no civil or political rights under the Constitution, as citizens of the United States.

(11.) Whether, when, and on what terms *peace* shall be restored, declared, or recognized, depends upon the will of the political department of government, which alone has the power to declare war, and make peace.

(12.) Whether any of the civil or political rights guaranteed to citizens of the United States, under the Constitution, in time of peace, shall be restored to the public enemies of the country, will depend upon the will and pleasure of Congress, which has the power to withhold them, or to restore them, upon whatever terms or conditions it may prescribe by law.

(13.) The judicial department, which now consists of the Supreme, Circuit, and District Courts, is bound by the Constitution to follow, respect, and conform to the decisions of the political departments of the government upon all political questions, and to declare and administer the law in accordance therewith. Among these political questions, the most important are these, viz. When *civil war* shall be declared or recognized; when, and on what terms and conditions, peace shall be declared or recognized; whether, and on what terms, the insurgents may be restored to their original constitutional relations to the government?

When civil war has been declared or recognized, and when the inhabitants of a portion of the country have been lawfully declared or recognized as public enemies, the courts of the United States have no authority to treat any inhabitant of that portion of the country otherwise than as a public enemy. Such courts are by law closed against enemies of the country, who, having lost all civil and political rights in or against our government, have no lawful authority, so long as they retain that character or legal status, to appear or to act in our judicial tribunals as judges, officers, lawyers, suitors, or claimants.

(14.) The political departments may extend pardons, amnesty, or restoration of personal, civil, or political rights to all enemies according to law. The courts are bound to recognize and apply the decisions of these departments to all cases and persons affected by them.

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[No. 2. Preface, p. v., and pp. 28–132.]

SLAVERY.

A brief Sketch of the Laws of Congress, the Acts of the Executive, and the Amendments of the Constitution, by which Slavery has been terminated in the United States, and Civil and Political Rights have been guaranteed to all Citizens, without Distinction of Color, Race, or previous Condition of Slavery.

As slavery was the prime cause of rebellion, any further toleration of it seemed inconsistent with the preservation of our government. Hence it was one of the leading objects of the author to prove that, by virtue of the powers devolved upon the President and upon Congress by the existence of civil war, they had, for the first time since the formation of the Union, an unquestionable right to give freedom to slaves, without violating any clause of the Constitution. In the preceding essays, several modes of accomplishing this object were indicated, of which either one or all might be rightfully adopted in accordance with principles sanctioned by jurists and publicists of the highest authority, on questions of international law as applied to cases of civil war.

At the present time (A. D. 1870), after a lapse of more than eight years since the publication of the first edition of the "War Powers," a brief reference to the most important measures by which slavery has been actually overthrown and extirpated, will show how far the legal, political, and constitutional principles advocated in this work have received the subsequent indorsement and approval of the several departments of our government.

Just before the rebellion broke out, Congress had passed, by a unanimous vote, the following declaratory resolution: —

"*Resolved,* That neither the Federal government, nor the people, nor the governments of the non-slaveholding States, have the right to legislate upon, or interfere with, slavery in any of the slaveholding States in the Union."

The sacrifice to slavery demanded as a prelude to rebellion by the southern leaders of the democratic party, which then had control of the government, a sacrifice which was actually submitted to by republicans, in hope of saving the Union by averting the calamities of war, is recorded in the joint resolution which passed the Senate, 24 to 12, and the House, 133 to 65, on the 2d of March, 1861. It was in these terms: —

"That the following articles be proposed to the legislatures of the several States, as an amendment to the Constitution of the United States, which, when ratified by three fourths of said legislatures, shall be valid, to all intents and purposes, as part of the said Constitution.

"ART. XIII. No amendments shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any

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State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said States."

The attack of the rebels upon Fort Sumter, on the 14th of April, 1861, put an end to all further movements of leading republicans of the free States in Congress, tending to the perpetuation of slavery.

On the 20th of July, 1861, Mr. Trumbull, of Illinois, chairman of the Senate committee on the judiciary, reported a bill by order of that committee, to *confiscate* the property used for insurrectionary purposes. He afterwards offered an additional section as an amendment, which provided for the forfeiture of all "claims to labor or service," under State laws, of slaves employed in aiding or promoting insurrection. This amendment passed the Senate by a vote of 33 to 6. In the House, on the 3d of August, 1861, the bill was reported by Mr. Bingham, from the committee on the judiciary, with an amended section, which was more effective, and secured forfeiture of and freedom to all slaves who should thereafter be required or permitted by their masters to do any work in or on any fort, navy yard, dock, armory, ship, or intrenchment, or in any military or naval service whatever, against the government and lawful authority of the United States. This amendment was adopted; ayes 53, nays 42; and the bill passed the House; yeas 60, nays 48; and as amended passed the Senate, and was approved August 6, 1861. (Chap. 60.)

Mr. Eliot, of Massachusetts, December 2, 1861, introduced, on leave, a joint resolution setting forth that, while we disclaim all power under the Constitution to interfere by ordinary legislation with the institutions of the States, yet the war now existing must be conducted according to the usages and rights of military service. "That, therefore, we do hereby declare the President as commander-in-chief of our army, and the officers under him have the right to emancipate all persons held as slaves in any military district in a state of insurrection against the national government; and that we respectfully advise that such order of emancipation be issued, whenever the same will avail to weaken the power of the rebels in arms, or to strengthen the military power of the loyal forces." This resolution was rejected by Congress.

December 5, Mr. Trumbull, of Illinois, introduced a bill into the Senate, which provided that the slaves of *persons* who should *take up arms* against the United States, or in any manner aid or abet the rebellion, should be made free.

December 11, Mr. Morrill, of Maine, introduced into the Senate a joint resolution to confiscate the property of rebels and satisfy the just claims of loyal persons. This also provided for the freedom of slaves of rebels opposed to the government. Several other bills, resolutions, and amendments were offered by senators, all having the same general object, and the same limitations. All these bills and resolutions were referred to a committee. In the House Mr. Eliot's joint resolution and various other measures were

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in like manner referred to a committee of the House, of which Mr. Eliot was a member. Subsequently, by unanimous consent of the House, he introduced two bills, of which one was, "To confiscate the property of rebels for the payment of the expenses of the present rebellion, and for other purposes;" the other was a bill to free from servitude the slaves of rebels engaged in abetting the existing rebellion against the government of the United States. These bills, having been referred to a committee, were reported back on the 20th of April, 1862, and were then, and for several succeeding days, debated in the House. Mr Sedgwick, of New York, offered an amendment which made it the duty of every commanding officer of a naval or military department within any portion of the rebel States, by proclamation, or in some other way, to *invite all slaves* to come within our lines and to be enrolled in the service of the United States. "And by that," he said, "I mean any service they can render, civil or military; and that it shall be the duty of such commanding officer to enroll every such person, and employ such of them as may be necessary in the service of the United States, and to reward these services with freedom to them and to their descendants forever. I include in that the slaves not only of rebels, but of persons claiming to be loyal; but I propose for these, compensation, and I also propose compensation for the services of all such as may be claimed by widows and minors." This amendment of Mr. Sedgwick received only *thirty-two* votes, while negative votes were *one hundred and sixteen.*

After these confiscation and partial emancipation measures had passed through an unusual variety of transformations, they came before a committee of conference between the House and Senate, which finally reported in substance the Senate amendment prepared by Mr. Clark, of New Hampshire, which combined the confiscation and emancipation measures in one bill, and this received the approval of the President July 17, 1862. (Chap. 195.) This act provides that slaves of persons who gave aid and comfort to the rebellion, refugees to our lines, slaves captured from or those deserted by rebels, slaves found by our troops in places which had been held by rebels, should be deemed *captives of war*, and be made *free;* that fugitive slaves should not be returned to rebel masters; that our military officers should not return fugitive slaves even to loyal owners; and that the President might employ persons of African descent for the suppression of the rebellion, &c. This act was confined to slaves who might be deemed *captives of war;* and to them alone it gave freedom.

December 16, 1861, Mr. Wilson, of Massachusetts, introduced a bill into the Senate "for the release of certain persons held to service or labor in the District of Columbia." It passed the Senate April 3, 1862, and the House, 92 to 39, April 11, and was approved April 16, 1862. (Acts of 1862, Chap. 54.)

On the 23d of December, 1861, Mr. Wilson, of Iowa, introduced a resolution, "That the committee on military affairs be requested to report a

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bill to this House for the enactment of an additional article of war, whereby all officers in the military service of the United States should be prohibited from using any portion of the forces under their respective commands for the purpose of returning to their masters fugitives from service or labor, and to provide for the punishment of such officers as may violate said article by dismissal from the service." A bill was accordingly reported and passed, and was approved March 13, 1862. (Chap. 40.)

President Lincoln recommended in his Message of March 6, 1862, to Congress, the adoption of a resolution, "That the United States ought to coöperate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such change of system."

March 10, 1862, Mr. Conkling, of New York, asked leave to introduce into the House a joint resolution to that effect. Leave was granted, and the resolution, having been introduced, passed the House March 11 (89 to 31). On the 2d of April it passed the Senate (32 to 10); and was approved April 10, 1862. (Joint Res. No. 26.)

Mr. Arnold, of Illinois, introduced into the House, March 24, 1862, a bill to prohibit slavery in the territories of the United States. It was reported back from the committee on territories, to whom it had been referred, with amendments, and was passed by the House, May 12 (85 to 50). In the Senate, the bill was referred to the committee on territories, and amended by striking out all after the enacting clause, and inserting, "That from and after the passage of this act, there shall be neither slavery nor involuntary servitude in any of the territories of the United States, now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in punishment of crimes, whereof the party shall have been duly convicted." This bill, so amended, passed the Senate (28 to 10) on the 9th of June, 1862, and on the 17th passed the House, and was approved June 19, 1862. (Chap. 111.)

By a bill which was introduced by Mr. Grimes, of Iowa, April 29, 1862, the school tax on property of colored persons residing in the District of Columbia, which had previously been expended in maintenance of schools for white children, was to be in future applied to maintain schools for colored children; and by an amendment proposed by Mr. Wilson, of Massachusetts, persons of color in that district were placed on the same footing with white persons as to their laws, trials for offences, and punishment for crimes. This act was approved May 21, 1862. (Chap. 83.)

June 12, 1862, Mr. Sumner introduced a bill to carry into effect the treaty with Great Britain for the suppression of the slave trade. This was approved July 1, 1862.

June 23, 1862, Mr. Lovejoy, of Illinois, introduced a bill to provide for the inauguration in the District, of a system of public schools for the edu-

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cation of colored youth; creating a board of trustees, who possess the same powers in relation to colored children as the trustees of public schools in Washington and Georgetown. This bill was approved July 11, 1862. (Chap. 151.)

July 8, 1862, Mr. Foster, of Connecticut, introduced a bill authorizing the President to make certain humane provisions for persons of color, delivered from on board vessels seized in the prosecution of the slave trade by commanders of United States vessels. This was passed, and approved July 17, 1862.

An additional act, introduced by Mr. Wilson, of Massachusetts, and amended on motions of Mr. Grimes and Mr. Sumner, to remove some of the vestiges of slavery in the District, was approved July 12, 1862. It provides, among other things, that slaves employed in the District after April 16, 1862, shall be free; and that *color* shall not exclude witnesses in any judicial proceedings of the courts of the District. (Chap. 155.)

July 8, 1862, Mr. Wilson, of Massachusetts, reported from the committee on military affairs a bill to "amend the act of February 28, 1795, for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion." Mr. Grimes, of Iowa, moved to amend it by adding provisions that there should be no exemption from military duty on account of color; that when the militia should be called into service, the President should have full power and authority to organize them according to race and color. Mr. King, of New York, moved to strike out the first two sections of Mr. Grimes's amendment, and to insert two new sections: —

"That the President be, and he is hereby, authorized to receive into the service of the United States, for the purpose of constructing intrenchments or performing camp service, or any other labor, or any war service for which they may be found competent, persons of African descent; and such persons shall be enrolled and organized under such regulations, not inconsistent with the constitution and laws, as the President may prescribe; and they shall be fed, and paid such compensation for their services as they may agree to receive when enrolled.

"That when any man or boy of African descent shall render any such service as is provided for in the first section of this act, he, his mother, and his wife and children shall forever thereafter be free, any law, usage, or custom whatsoever to the contrary notwithstanding."

A violent and continuous discussion arose upon this bill between those who would have colored persons introduced as *soldiers* into our army and those opposed to that measure, although there was but little objection to their employment as laborers. This bill was passed and approved July 17, 1862. (Chap. 201.) And under it, for the first time in the history of this country since the adoption of the Constitution, persons of African descent could, by law of Congress, be introduced into the military service as soldiers. They were by subsequent acts required to be enrolled in the same manner as white men, and were made part of the militia of the United States. Their pay — which was at first ten dollars per month, and rations, and the freedom of

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themselves, and under certain conditions the freedom of their families, was, by subsequent acts, equalized with that of other soldiers from and after January 1, 1864. (See Note on the laws for raising and organizing military forces, p. 478.)

On the 17th of February, 1863, Mr. Wilson, of Massachusetts, introduced a bill to incorporate "an institution for the education of colored youth," to be located in the District of Columbia; and it passed the Senate (29 to 9), and having on the 2d of March passed the House, was approved March 3, 1863.

June 25, 1864, the President approved an act which made it the duty of the school commissioners in the District to establish public schools for colored children, to provide school-houses, to employ teachers, and to appropriate a proportion of the school fund, to be determined by the number of white and colored children between the ages of six and seventeen years. About thirty-five hundred colored children obtained by this law the same privileges as white ones in public schools at Washington and Georgetown.

One of the important acts of Congress was that by which the Freedman's Bureau was established under the war power of the government. The bill to erect a bureau for freedmen and refugees was first introduced into the House by Mr. Eliot, of Massachusetts, December, 1863. It passed the House, but failed in the Senate. In 1864 it was again brought forward, with some amendments, and was passed; and was approved March 3, 1865. (For Letter of Mr. Eliot, relating to the act, see Note No. 9, page 464.)

Of all measures taken by Congress in relation to slavery, the most important was the resolution for submitting to the States a proposition to amend the Constitution by prohibiting slavery forever. On the 14th December, 1863, Mr. Ashley, of Ohio, and Mr. Wilson, of Iowa, presented resolutions to that effect, both of which were referred to the committee on judiciary, of which Mr. Wilson was chairman. In the Senate, Mr. Henderson, of Indiana, on the 11th of January, and Mr. Sumner, of Massachusetts, on the 8th of February, 1864, introduced similar resolutions, which were referred to the judiciary committee. February 10, Mr. Trumbull, chairman of that committee, reported adversely on Mr. Sumner's resolution, and on Mr. Henderson's, but reported a resolution, —

"That the following article be proposed to the legislatures of the several States, as an amendment of the Constitution of the United States, which, when ratified by three fourths of said legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution — namely,

"'Art. XIII. Sect. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"'Sect. 2. Congress shall have power to enforce this article by appropriate legislation.'"

In this form the resolution passed the Senate (38 to 6), although it failed at that time in the House; but it was subsequently (January 27, 1865) passed in the House by the requisite two thirds vote, and was approved

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February 1, 1865 (Resolution No. 11, Stat. 1865, page 567), and has been subsequently ratified, and is now a part of our Constitution.

The "Act to protect all persons in the United States in their civil rights, and furnish the means of their vindication" (approved April 9, 1866), declared that all persons should be deemed citizens of the United States who were born in the United States, and not subject to any foreign power (excluding only Indians not taxed), including persons of every race and color, without regard to any previous condition of slavery. It declared that they should all have the same rights of persons and property, and be liable only to the same penal laws as white citizens; and it made any violation of these rights a penal offence. It provided effective machinery for the execution of the law in all parts of the country. This law was of vast importance in securing justice and liberty for the colored race in the Southern States. With this act, which was the precursor of the amendment of the Constitution which embodies the same principles, the names of Mr. Trumbull, of Illinois, and of Mr. Bingham, of Ohio, are indissolubly connected. This act was followed by the joint resolution of 16th June, 1866, proposing the following amendment to the Constitution, which was subsequently ratified, and duly proclaimed by the Secretary of State.

Amendment XIV.

Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Sect. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sect. 3. No person shall be a senator, or representative in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

Sect. 4. The validity of the public debt of the United States, author-

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ized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any State, shall assume or pay any debt or obligation, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sect. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

On the 24th of January, 1867, Congress passed an act (Stat. 1867, Chap. 15) providing that the elective franchise in the Territories should not be, thereafter, denied to any persons on account of color, race, or previous condition of servitude.

The joint resolution of Congress of February 27, 1869, proposed the Fifteenth Amendment of the Constitution. The ratification thereof was announced by the State Department March 30, 1870, and by a proclamation of the President.

Amendment XV.

Sect. 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Sect. 2. Congress shall have power to enforce this article by appropriate legislation.

This amendment has been followed by the acts of May 31, 1870, chap. 114, and July 14, 1870, chap. 254, to enforce the provisions thereof, securing the right guaranteed by the amendment, requiring a true registry of legal voters to be prepared at stated times, and affixing heavy penalties for false voting, false registering, or false counting, or for wrongfully refusing to register or to receive a vote, or for bribery, corruption, or intimidation.

Acts of the Executive relating to Slavery.

The most important acts of President Lincoln in relation to slavery plainly indicate the rapid advancement made by him towards the conclusion that slavery must be destroyed in order that the republic might be preserved. The steps which marked his progress may be traced in the following proclamations: —

By the President of the United States of America.

A PROCLAMATION.

Whereas there appears in the public prints what purports to be a proclamation of Major General Hunter, in the words and figures following, to wit: —

"*Headquarters Department of the South,*
"Hilton Head, S. C., May 9, 1862.

"General Orders No. 11. — The three States of Georgia, Florida, and South Carolina, comprising the military department of the South, having deliberately declared themselves no longer under the protection of the United States of America, and having taken up arms against the said United States, it becomes a military necessity to declare them under mar-

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tial law. This was accordingly done on the 25th day of April, 1862. Slavery and martial law in a free country are altogether incompatible; the persons in these three States — Georgia, Florida, and South Carolina — heretofore held as slaves, are therefore declared forever free.

"(Official) DAVID HUNTER,
"Major General Commanding.
"ED. W. SMITH, Acting Assistant Adjutant Gen'l."

And whereas the same is producing some excitement and misunderstanding, therefore,

I, ABRAHAM LINCOLN, President of the United States, proclaim and declare, that the Government of the United States had no knowledge, information, or belief, of an intention on the part of General Hunter to issue such a proclamation; nor has it yet any authentic information that the document is genuine. And further, that neither General Hunter, nor any other commander, or person, has been authorized by the Government of the United States to make proclamations declaring the slaves of any State free; and that the supposed proclamation now in question, whether genuine or false, is altogether void, so far as respects such declaration.

I further make known that whether it be competent for me, as Commander-in-Chief of the Army and Navy, to declare the slaves of any State or States free, and whether at any time, in any case, it shall have become a necessity indispensable to the maintenance of the Government, to exercise such supposed power, are questions which, under my responsibility, I reserve to myself, and which I cannot feel justified in leaving to the decision of commanders in the field. These are totally different questions from those of police regulations in armies and camps.

On the sixth day of March last, by a special message, I recommended to Congress the adoption of a joint resolution to be substantially as follows: —

"*Resolved*, That the United States ought to coöperate with any State which may adopt a gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such change of system."

The resolution, in the language above quoted, was adopted by large majorities in both branches of Congress, and now stands an authentic, definite, and solemn proposal of the nation to the States and people most immediately interested in the subject-matter. To the people of those States I now earnestly appeal — I do not argue — I beseech you to make the argument for yourselves — You cannot, if you would, be blind to the signs of the times — I beg of you a calm and enlarged consideration of them, ranging, if it may be, far above personal and partisan politics. This proposal makes common cause for a common object, casting no reproaches upon any. It acts not the Pharisee. The change it contemplates would come gently as the dews of heaven, not rending or wrecking anything. Will you not embrace it? So much good has not been done, by one effort, in all past time, as, in the providence of God, it is now your high privilege to do. May the vast future not have to lament that you have neglected it.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the City of Washington, this nineteenth day of May, in
[SEAL.] the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-sixth.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

I, ABRAHAM LINCOLN, President of the United States of America, and Commander-in-Chief of the Army and Navy thereof, do hereby proclaim and declare that hereafter, as heretofore, the war will be prosecuted for the object of practically restoring the constitutional relation between the United States and each of the States and the people thereof, in which States that relation is or may be suspended or disturbed.

That it is my purpose, upon the next meeting of Congress, to again recommend the adoption of a practical measure tendering pecuniary aid to the free acceptance or rejection of all slave States, so called, the people whereof may not then be in rebellion against the United States, and which States may then have voluntarily adopted, or thereafter may voluntarily adopt, immediate or gradual abolishment of slavery within their respective limits; and that the effort to colonize persons of African descent with their consent upon this continent or elsewhere, with the previously obtained consent of the governments existing there, will be continued.

That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

That the Executive will, on the first day of January aforesaid, by proclamation, designate the States and parts of States, if any, in which the people thereof, respectively, shall then be in rebellion against the United States; and the fact that any State, or the people thereof, shall on that day be, in good faith, represented in the Congress of the United States by members chosen thereto at elections wherein a majority of the qualified voters of such State shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States.

That attention is hereby called to an act of Congress entitled "An Act to make an additional article of war," approved March 13, 1862, and which act is in the words and figures following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter the following shall be promulgated as an additional article of war, for the government of the army of the United States, and shall be obeyed and observed as such:

"ARTICLE —. All officers or persons in the military or naval service of the United States are prohibited from employing any of the forces under their respective commands for the purpose of returning fugitives from service or labor who may have escaped from any persons to whom such service or labor is claimed to be due, and any officer who shall be found guilty by a court martial of violating this article shall be dismissed from the service.

"SEC. 2. *And be it further enacted,* That this act shall take effect from and after its passage."

Also to the ninth and tenth sections of an act entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate property of rebels, and for other purposes," approved July 17, 1862, and which sections are in the words and figures following:

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"SEC. 9. *And be it further enacted*, That all slaves of persons who shall hereafter be engaged in rebellion against the Government of the United States, or who shall in any way give aid or comfort thereto, escaping from such persons, and taking refuge within the lines of the army; and all slaves captured from such persons or deserted by them, and coming under the control of the Government of the United States; and all slaves of such persons found *on* [or] being within any place occupied by rebel forces, and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.

"SEC. 10. *And be it further enacted*, That no slave escaping into any State, Territory, or the District of Columbia, from any other State, shall be delivered up, or in any way impeded or hindered of his liberty, except for crime, or some offence against the laws, unless the person claiming said fugitive shall first make oath that the person to whom the labor or service of such fugitive is alleged to be due is his lawful owner, and has not borne arms against the United States in the present rebellion, nor in any way given aid and comfort thereto; and no person engaged in the military or naval service of the United States shall, under any pretence whatever, assume to decide on the validity of the claim of any person to the service or labor of any other person, or surrender up any such person to the claimant, on pain of being dismissed from the service."

And I do hereby enjoin upon and order all persons engaged in the military and naval service of the United States to observe, obey, and enforce, within their respective spheres of service, the act and sections above recited.

And the Executive will in due time recommend that all citizens of the United States who shall have remained loyal thereto throughout the rebellion shall (upon the restoration of the constitutional relation between the United States and their respective States and people, if that relation shall have been suspended or disturbed) be compensated for all losses by acts of the United States, including the loss of slaves.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

[L. S.] Done at the City of Washington this twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-seventh.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing, among other things, the following, to wit:

"That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever, free: and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

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"That the Executive will, on the first day of January aforesaid, by proclamation, designate the States and parts of States, if any, in which the people thereof, respectively, shall then be in rebellion against the United States; and the fact that any State, or the people thereof, shall on that day be in good faith represented in the Congress of the United States, by members chosen thereto at elections wherein a majority of the qualified voters of such States shall have participated, shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States."

Now, therefore, I, ABRAHAM LINCOLN, President of the United States, by virtue of the power in me vested as Commander-in-Chief of the Army and Navy of the United States, in time of actual armed rebellion against the authority and Government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do, publicly proclaimed for the full period of one hundred days from the day first above mentioned, order and designate as the States and parts of States wherein the people thereof, respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana (except the parishes of St. Bernard, Plaquemines, Jefferson, St. John, St. Charles, St. James, Ascension, Assumption, Terre Bonne, Lafourche, St. Mary, St. Martin, and Orleans, including the city of New Orleans), Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia (except the forty-eight counties designated as West Virginia, and also the counties of Berkeley, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including the cities of Norfolk and Portsmouth), and which excepted parts are for the present left precisely as if this proclamation were not issued.

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States are, and henceforward shall be, free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known that such persons, of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.

In witness whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

[L. S.] Done at the City of Washington this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States of America the eighty-seventh.

ABRAHAM LINCOLN.

By the President:

WILLIAM H. SEWARD, *Secretary of State.*

NOTE. — For extracts from President Lincoln's Message of December 8, 1863, see pp. 250–253.

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[No. 3. See p. 26.]

SLAVES IN THE ARMY.

Compensation to Masters of Slaves employed in the Military Service of the United States.

The policy adopted by the government in relation to the use of slaves in the army is fully explained in a subsequent note upon the organization of persons of African descent as part of our military and naval forces.

The principles asserted in the text in relation to the right of our government to use slaves of loyal and of disloyal masters have been recognized and confirmed by several acts of Congress. The right of the masters to compensation has also been the subject of legislative discussion.

As the acts of April 16, 1862 (Chap. 54), and July 12, 1862, (Chap. 155), by which slavery in the District of Columbia was abolished, and by which compensation to slave masters was provided for, were not founded on the war powers of the government, they need not be especially noticed in this connection.

On the 22d of September, 1862, President Lincoln issued a proclamation in which he announced that it was his purpose to treat as free all slaves held in any State which should be declared in rebellion on the first day of the following January; and to propose, upon the next meeting of Congress, to grant pecuniary aid to all such slave States not then in rebellion, as would adopt measures for the gradual or immediate emancipation of slaves; and to recommend to Congress that all citizens of the United States who should be found to have remained loyal thereto throughout the rebellion (on restoration of peace) be *compensated* for all losses by acts of the United States, *including the loss of slaves.*

Claims to slaves employed for insurrectionary purposes, and claims of rebels to slaves however employed, were disallowed by acts of August 6, 1861 (Chap. 60), and April 16, 1862 (Chap. 54). By act of February 24, 1864 (Chap. 13), it is provided (Sec. 24) that, "When a slave of a loyal master shall be drafted and mustered into the service of the United States, his master shall have a certificate thereof, and thereupon such slave shall be free, and the *bounty of one hundred dollars,* now payable by law for each drafted man, shall be paid to the person to whom such drafted man was owing service or labor at the time of his muster into the service of the United States." The same bounty was also made payable to persons who had theretofore enlisted or volunteered in the service. The Secretary of War was requested to appoint a commission in each of the *Slave States* represented in *Congress,* charged to award to each loyal person to whom a colored volunteer may owe service a just compensation, not exceeding three hundred dollars, for each such volunteer, payable out of the fund derived from commutations; and every such colored volunteer, on being

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mustered into service, was to be free. The provisions of this act were made retrospective, so as to cover bounties and compensation to masters for prior enlistments of slaves.

Under this act commissioners were appointed by the Secretary of War, and rules were drawn up, and forms of deeds of manumission were prepared at the request of the Secretary of War, by the Solicitor of the War Department; and such commissioners awarded bounties and compensation to numerous slave masters residing in the loyal slave States, all of whom were required to execute such deeds of manumission before receiving their money. On the 10th of February, 1864, Mr. Trumbull, Senator from Illinois, Chairman of the Committee on the Judiciary, reported a resolution that an article abolishing slavery be proposed to the legislatures of the several States, as an amendment to the Constitution. This resolution was taken up by the Senate as in committee of the whole, on the 28th of March, and it was debated from time to time until the 8th of April, when it was finally passed, by vote of 38 to 6. On the 31st of May it was taken up in the House, and, after long discussion, was subsequently passed and approved, February 1, 1865. During the pendency of these discussions it is probable that there was no undue zeal or activity on the part of the commissioners to award bounties and compensations to slave masters. After the amendment was ratified, no further allowances were made; and neither the amendment of the Constitution nor the laws of Congress have provided for any further indemnity to loyal or disloyal citizens for the loss of their slaves.

The Fourteenth Amendment of the Constitution, recommended by Congress in 1866, and finally ratified by the States in 1868, provides that, "Neither the United States nor any State shall assume or pay any debt or obligation, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or the emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

[No. 4. See pp. 54 and 116.]

CONFISCATION.

The views of President Lincoln upon the Confiscation Act of July 17, 1862, were fully expressed by him in the following Message to Congress, dated on the same day on which he approved that act.

MESSAGE.

Fellow-citizens of the Senate and House of Representatives:

Considering the bill for an act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes, and the joint resolution explanatory of said act, as being substantially one, I have approved and signed both.

Before I was informed of the passage of the resolution, I had prepared

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the draft of a message stating objections to the bill becoming a law, a copy of which draft is herewith transmitted.

ABRAHAM LINCOLN.

July 17, 1862.

Fellow-citizens of the House of Representatives:

I herewith return to your honorable body, in which it originated, the bill for an act entitled an act to suppress treason and rebellion, to seize and confiscate the property of rebels, and for other purposes, together with my objections to its becoming a law.

There is much in the bill to which I perceive no objection. It is wholly prospective, and it touches neither the person nor property of any loyal citizen — in which particular it is just and proper.

The first and second sections provide for the conviction and punishment of persons who shall be guilty of treason, and the persons who shall incite, set on foot, assist or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort to any such existing rebellion or insurrection.

By fair construction the persons within these sections are not to be punished without regular trials in duly constituted courts, under the forms and all the substantial provisions of law, and of the Constitution applicable to their several cases. To this I perceive no objection, especially as such persons would be within the general pardoning power, and also within the special provision for pardon and amnesty contained in this act. It also provides that the slaves of persons confiscated under these sections shall be free. I think there is an unfortunate form of expression rather than a substantial objection in this. It is startling to say that Congress can free a slave within a State; and yet, were it said that the ownership of a slave had first been transferred to the nation, and that Congress had then liberated him, the difficulty would vanish; and this is the real case. The traitor against the general government forfeits his slave at least as justly as he does any other property, and he forfeits both to the government against which he offends. The government, so far as there can be ownership, owns the forfeited slaves, and the question for Congress in regard to them is, Shall they be made free, or sold to new masters? I see no objection to Congress deciding in advance that they shall be free. To the high honor of Kentucky, as I am informed, she has been the owner of some slaves by escheat, and has sold none, but liberated all. I hope the same is true of some other States. Indeed, I do not believe it would be physically possible for the general government to return persons so circumstanced to actual slavery. I believe there would be physical resistance to it, which would never be turned aside by argument, nor driven away by force. In this view of it, I have no objection to this feature of the bill.

Another matter involved in these two sections and running through other parts of the act, will be noticed hereafter.

I perceive no objection to the third and fourth sections. So far as I wish to notice the fifth and sixth sections, they may be considered together. That the enforcement of these sections would do no injustice to the persons embraced within them is clear. That those who make a causeless war should be compelled to pay the cost of it, is too obviously just to be called in question. To give government protection to the property of persons who have abandoned it and gone on a crusade to overthrow that same government is absurd, if considered in the mere light of justice. The severest justice may not always be the best policy. The principle of seizing and appropriating the property of the persons embraced within these sections is certainly not

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very objectionable, but a justly indiscriminating application of it would be very difficult, and to a great extent impossible; and would it not be wise to place a power of remission somewhere, so that these persons may know that they have something to save by desisting?

I am not sure whether such power of remission is or is not within section thirteen without a special act of Congress. I think our military commanders, when, in military phrase, they are within the enemy's country, should in an orderly manner seize and keep whatever of real or personal property may be necessary or convenient for their commands, and at the same time preserve in some way the evidence of what they do.

What I have said in regard to slaves while commenting on the first and second sections, is applicable to the ninth, with the difference that no provision is made in the whole act for determining whether a particular individual slave does or does not fall within the class defined within that section. He is to be free upon certain conditions; but whether these conditions do or do not pertain to him, no mode of ascertaining is provided. This could be easily supplied.

To the tenth section I make no objection. The oath therein required seems to be proper, and the remainder of the section is substantially identical with a law already existing.

The eleventh section simply assumes to confer discretionary powers upon the Executive without the law. I have no hesitation to go as far in the direction indicated as I may at any time deem expedient, and I am ready to to say now I think it is proper for our military commanders to employ as laborers as many persons of African descent as can be used to advantage.

The twelfth and thirteenth sections are something better; they are unobjectionable, and the fourteenth is entirely proper if all other parts of the act shall stand.

That to which I chiefly object pervades most parts of the act, but more distinctly appears in the first, second, seventh, and eighth sections. It is the sum of those provisions which results in the divesting of title forever. For the causes of treason — the ingredients of treason, but amounting to the full crime — it declares forfeiture extending beyond the lives of the guilty parties, whereas the Constitution of the United States declares that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. True, there is to be no formal attainder in this case; still I think the greater punishment cannot be constitutionally inflicted in a different form for the same offence. With great respect, I am constrained to say I think this feature of the act is unconstitutional. It would not be difficult to modify it.

I may remark that the provision of the Constitution, put in language borrowed from Great Britain, applies only in this country, as I understand, to real estate.

Again, this act, by proceedings *in rem*, forfeits property for the ingredients of treason without a conviction of the supposed criminal, or a personal hearing given him in any proceeding. That we may not touch property lying within our reach because we cannot give personal notice to an owner who is absent endeavoring to destroy the government, is certainly not very satisfactory. Still the owner may not be thus engaged, and I think a reasonable time should be provided for such parties to appear and have personal hearings. Similar provisions are not uncommon in connection with proceedings *in rem*.

For the reasons stated I return the bill to the House, in which it originated.

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President Lincoln, at this time, held the opinion that Congress had no power "to free a slave within a State," although he was satisfied that if slaves of rebels should by capture become the property of the government, it might and ought to restore such captives to freedom. He had also fallen into the error of supposing that Congress had no power to pass a law for confiscating the real estate of rebels in fee simple. After a subsequent and through examination of the subject, his opinion was changed; and with that frankness and sincerity for which he was so remarkable, he communicated to others the views he then entertained, and authorized the Hon. George W. Julian, a member of Congress from Indiana, one of his highly esteemed friends, to announce in public that he was ready to give his official support and sanction to a repeal of the declaratory resolution, which, as he understood it, limited forfeitures for treason to life estates of traitors. In 1863–4 both Houses of Congress passed a bill which contained a clause repealing that resolution; but the project of reconstrucion which it embodied was not, in some respects, satisfactory to the President, and it did not become a law.

In 1864–5 bills passed each branch of Congress having the effect of abrogating this qualifying resolution, but neither of them became a law: nevertheless, these facts and proceedings show that the House, the Senate, and the President, after mature consideration, gave their practical sanction to the correctness of the constitutional doctrine stated in the text. The error of the President was of the gravest character; it resulted in paralyzing, if it did not wholly destroy, one of the most effective means of crushing the spirit of rebellion; for it left the rebel owners of large estates, at the end of the war, in full possession and control of their lands, and they managed to exclude from ownership of the soil the great body of freedmen and of the poorer classes of white men who were friendly to the Union. (See p. 230–239.) If these colossal plantations had been confiscated in fee, and broken up into small farms, and distributed among the loyal common people, the power of that class which caused the war would have terminated with the surrender of their armies. Estates for life, in a time of war, could hardly find purchasers, and were of so uncertain a tenure, that confiscation, so far as it applied to real estate, was as useless to the government as it was harmless to the enemy.

Confederate Laws of Confiscation.

The "Confederate States" passed a series of acts, from which we may learn the views entertained by strict constructionists in relation to the war powers of their own government, which had adopted the Constitution of the United States and the laws thereof, with few, if any alterations, excepting as regards slavery.

On the 8th of August, 1861, the Provisional Congress passed "An Act respecting alien enemies" (Chap. 19. See Stat. at Large of the Provisional Congress, page 174), as follows:

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The Congress of the Confederate States of America do enact, That whenever there shall be a declared war between the Confederate States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted or threatened against the territory of the Confederate States, by any foreign nation or government, and the President of the Confederate States shall make public proclamation of the event, or the same shall be proclaimed by act of Congress, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of fourteen years of age and upwards, who shall be within the Confederate States, and not citizens thereof, shall be liable to be apprehended, restrained or secured, and removed as alien enemies: *Provided*, That during the existing war, citizens of the United States, residing within the Confederate States, with intent to become citizens thereof, and who shall make a declaration of such intention, in due form, and acknowledging the authority of the government of the same, shall not become liable as aforesaid, nor shall this act extend to citizens of the States of Delaware, Maryland, Kentucky, Missouri, and of the District of Columbia, and the Territories of Arizona and New Mexico, and the Indian Territory south of Kansas, who shall not be chargeable with actual hostility or other crime against the public safety, and who shall acknowledge the authority of the government of the Confederate States.

SEC. 2. The President of the Confederate States shall be, and he is hereby, authorized, by his proclamation, or other public act, in case of existing or declared war, as aforesaid, to provide for the removal of those who, not being permitted to reside within the Confederate States, shall refuse or neglect to depart therefrom; and to establish such regulations in the premises as the public safety may require.

SEC. 3. Immediately after the passage of this act, the President of the Confederate States shall, by proclamation, require all citizens of the United States, being males of fourteen years and upwards, within the Confederate States, and adhering to the government of the United States, and acknowledging the authority of the same, and not being citizens of the Confederate States, nor within the proviso of the first section of this act, to depart from the Confederate States within forty days from the date of said proclamation; and such persons remaining within the Confederate States after that time shall become liable to be treated as alien enemies; and in all cases of declared war as aforesaid, aliens, resident within the Confederate States, who shall become liable as enemies as aforesaid, and who shall not be chargeable with actual hostility or other crime against the public safety, shall be allowed the time for the disposition of their effects and for departure, which may be stipulated by any treaty with such hostile nation or government; and when no such treaty may exist the President shall prescribe such time as may be consistent with the public safety, and accord with the dictates of humanity and national hospitality.

SEC. 4. After any declared war, or proclamation, as aforesaid, it shall be the duty of the several courts of the Confederate States, and of each State having criminal jurisdiction, and of the several judges and justices of the courts of the Confederate States, and they are hereby authorized, upon complaint against any alien, or alien enemies, as aforesaid, or persons coming within the purview of this act, who shall be resident, or remaining in the Confederate States, and at large within the jurisdiction or district of such judge or court, as aforesaid, contrary to the intent of this act, and of the proclamation of the President of the Confederate States, or the regulations prescribed by him, in pursuance of this act, to cause such alien or aliens, person or persons, as aforesaid, to be duly apprehended and convened before such court, judge or justice, for examination; and after a full examina-

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tion and hearing in such complaint, and sufficient cause therefor appearing, shall or may order such alien or aliens, person or persons, to be removed out of the territory of the Confederate States, or to be otherwise dealt with or restrained, conformably to the intent of this act, and the proclamation or regulations which may be prescribed as aforesaid, and may imprison or otherwise secure such alien person until the order which shall be made shall be performed.

SEC. 5. It shall be the duty of the marshal of the district, in which any alien enemy or person offending against the provisions of this act, shall be apprehended, who by the President of the Confederate States, or by order of any court, judge or justice, as aforesaid, shall be required to depart, [or] to be removed as aforesaid, to execute such order by himself or deputy, or other discreet person, and for such execution the marshal shall have the warrant of the President, or the court or judge, as the case may be.

Approved August 8, 1861.

On the 30th of August, 1861, the Confederates passed the following "Act for the sequestration of the estates, property, and effects of alien enemies, and for the indemnity of citizens of the Confederate States, and persons aiding the same in the existing war with the United States."

Whereas the Government and people of the United States have departed from the usages of civilized warfare in confiscating and destroying the property of the people of the Confederate States of all kinds, whether used for military purposes or not; *and whereas*, our only protection against such wrongs is to be found in such measures of retaliation as will ultimately indemnify our own citizens for their losses, and restrain the wanton excesses of our enemies: Therefore —

Be it enacted by the Congress of the Confederate States of America, That all and every the lands, tenements and hereditaments, goods and chattels, rights and credits within these Confederate States, and every right and interest therein held, owned, possessed or enjoyed by or for any alien enemy since the twenty-first day of May, one thousand eight hundred and sixty-one, except such debts due to an alien enemy as may have been paid into the Treasury of any one of the Confederate States prior to the passage of this law, be, and the same are hereby, sequestrated by the Confederate States of America, and shall be held for the full indemnity of any true and loyal citizen or resident of these Confederate States, or other person aiding said Confederate States in the prosecution of the present war between said Confederate States and the United States of America, and for which he may suffer any loss or injury under the act of the United States, to which this act is retaliatory, or under any other act of the United States, or of any State thereof authorizing the seizure, condemnation, or confiscation of the property of citizens or residents of the Confederate States, or other person aiding said Confederate States, and the same shall be seized and disposed of as provided for in this act: *Provided, however*, When the estate, property or rights to be effected by this act were, or are, within some State of this Confederacy, which has become such since said twenty-first day of May, then this act shall operate upon and as to such estate, property or rights, and all persons claiming the same from and after the day such State so became a member of this Confederacy, and not before: *Provided, further*, That the provisions of the act shall not extend to the stocks or other public securities of the Confederate Government, or of any of the States of this Confederacy held or owned by any alien enemy, or to any debt, obligation, or sum due from the Confederate Government, or any of the States, to such

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alien enemy: *And provided, also,* That the provisions of this act shall not embrace the property of citizens or residents of either of the States of Delaware, Maryland, Kentucky or Missouri, or of the District of Columbia, or the Territories of New Mexico, Arizona, or the Indian Territory south of Kansas, except such of said citizens or residents as shall commit actual hostilities against the Confederate States, or aid and abet the United States in the existing war against the Confederate States.

SEC. 2. *And be it further enacted,* That it is, and shall be, the duty of each and every citizen of these Confederate States speedily to give information to the officers charged with the execution of this law of any and every lands, tenements and hereditaments, goods and chattels, rights and credits within this Confederacy, and of every right and interest therein held, owned, possessed or enjoyed by or for any alien enemy as aforesaid.

SEC. 3. *Be it further enacted,* That it shall be the duty of every attorney, agent, former partner, trustee or other person holding or controlling any such lands, tenements or hereditaments, goods or chattels, rights or credits, or any interest therein, of or for any such alien enemy, speedily to inform the receiver hereinafter provided to be appointed, of the same, and to render an account thereof, and, so far as is practicable, to place the same in the hands of such receiver; whereupon, such person shall be fully acquitted of all responsibility for property and effects so reported and turned over. And any such person wilfully failing to give such information and render such account shall be guilty of a high misdemeanor, and upon indictment and conviction, shall be fined in a sum not exceeding five thousand dollars, and imprisoned not longer than six months, said fine and imprisonment to be determined by the court trying the case, and shall further be liable to be sued by said Confederate States, and subjected to pay double the value of the estate, property or effects of the alien enemy held by him or subject to his control.

SEC. 4. It shall be the duty of the several judges of this Confederacy to give this act specially in charge to the grand juries of these Confederate States, and it shall be their duty at each sitting well and truly to enquire and report all lands, tenements and hereditaments, goods and chattels, rights and credits, and every interest therein, within the jurisdiction of said grand jury, held by or for any alien enemy, and it shall be the duty of the several receivers, appointed under this act, to take a copy of such report, and to proceed in obtaining the possession and control of all such property and effects reported, and to institute proceedings for the sequestration thereof in the manner hereinafter provided.

SEC. 5. *Be it further enacted,* That each judge of this Confederacy shall, as early as practicable, appoint a receiver for each section of the State for which he holds a court, and shall require him, before entering upon the duties of his office, to give a bond in such penalty as may be prescribed by the judge, with good and sufficient security, to be approved by the judge, conditioned that he will diligently and faithfully discharge the duties imposed upon him by law. And said officer shall hold his office at the pleasure of the judge of the district or section for which he is appointed, and shall be removed for incompetency, or inefficiency, or infidelity in the discharge of his trust. And should the duties of any such receiver, at any time, appear to the judge to be greater than can be efficiently performed by him, then it shall be the duty of the judge to divide the district or section into one or more other receivers' districts, according to the necessities of the case, and to appoint a receiver for each of said newly created districts. And every such receiver shall also, before entering upon the duties of his office, make oath in writing before the judge of the district or section for which he is appointed, diligently, well and truly to execute the duties of his office.

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SEC. 6. *Be it further enacted*, That it shall be the duty of the several receivers aforesaid to take the possession, control and management of all lands, tenements and hereditaments, goods and chattels, rights and credits of each and every alien enemy within the section for which he acts. And to this end he is empowered and required, whenever necessary for accomplishing the purposes of this act, to sue for and recover the same in the name of said Confederate States, allowing, in the recovery of credits, such delays as may have been, or may be, prescribed in any State as to the collection of debts therein during the war. And the form and mode of action, whether the matter be of jurisdiction in law or equity, shall be by petition to the court setting forth, as best he can, the estate, property, right or thing sought to be recovered, with the name of the person holding, exercising supervision over, in possession of, or controlling the same, as the case may be, and praying a sequestration thereof. Notice shall thereupon be forthwith issued by the clerk of the court, or by the receiver, to such person, with a copy of the petition, and the same shall be served by the marshal or his deputy and returned to the court as other mesne process in law cases; whereupon, the cause shall be docketed and stand for trial in the court according to the usual course of its business, and the court or judge shall, at any time, make all orders of seizure that may seem necessary to secure the subject-matter of the suit from danger of loss, injury, destruction or waste, and may, pending the cause, make orders of sale in cases that may seem to such judge or court necessary to preserve any property sued for from perishing or waste: *Provided*, That in any case when the Confederate judge shall find it to be consistent with the safe-keeping of the property so sequestered, to leave the same in the hands and under the control of any debtor or person in whose hands the real estate and slaves were seized, who may be in possession of the said property or credits, he shall order the same to remain in the hands and under the control of said debtor or person in whose hands the real estate and slaves were seized, requiring in every such case such security for the safe-keeping of the property and credits as he may deem sufficient for the purpose aforesaid, and to abide by such further orders as the court may make in the premises. But this proviso shall not apply to bank or other corporation stock, or dividends due, or which may be due thereon, or to rents on real estates in cities. And no debtor or other person shall be entitled to the benefit of this proviso unless he has first paid into the hands of the receiver all interests or net profits which may have accrued since the twenty-first May, eighteen hundred and sixty-one; and, in all cases coming under this proviso, such debtor shall be bound to pay over annually to the receiver all interest which may accrue as the same falls due; and the person in whose hands any other property may be left shall be bound to account for, and pay over annually to the receiver, the net income or profits of said property, and on failure of such debtor or other person to pay over such interest, net income or profits, as the same falls due, the receiver may demand and recover the debt or property. And wherever, after ten days' notice to any debtor or person in whose hands property or debts may be left, of an application for further security, it shall be made to appear to the satisfaction of the court that the securities of such debtor or person are not ample, the court may, on the failure of the party to give sufficient additional security, render judgment against all the parties on the bond for the recovery of the debt or property: *Provided, further*, That said court may, whenever, in the opinion of the judge thereof, the public exigencies may require it, order the money due as aforesaid to be demanded by the receiver, and if upon demand of the receiver, made in conformity to a decreta. order of the court requiring said receiver to collect any debts for the pay-

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ment of which security may have been given under the provisions of this act, the debtor or his security shall fail to pay the same, then upon ten days' notice to said debtor and his security, given by said receiver, of a motion to be made in said court for judgment for the amount so secured, said court, at the next term thereof, may proceed to render judgment against said principal and security, or against the party served with such notice, for the sum so secured with interest thereon, in the name of said receiver, and to issue execution therefor.

SEC. 7. Any person in the possession and control of the subject-matter of any such suit, or claiming any interest therein, may, by order of the court, be admitted as a defendant and be allowed to defend to the extent of the interest propounded by him; but no person shall be heard in defence until he shall file a plea, verified by affidavit and signed by him, setting forth that no alien enemy has any interest in the right which he asserts, or for which he litigates, either directly or indirectly, by trust, open or secret, and that he litigates solely for himself, or for some citizens of the Confederate States whom he legally represents; and when the defence is conducted for or on account of another, in whole or part, the plea shall set forth the name and residence of such other person, and the relation that the defendant bears to him in the litigation. If the cause involves matter which should be tried by a jury according to the course of the common law, the defendant shall be entitled to a jury trial. If it involves matters of equity jurisdiction, the court shall proceed according to its usual mode of procedure in such cases, and the several courts of this Confederacy may, from time to time, establish rules of procedure under this act, not inconsistent with the act or other laws of these Confederate States.

SEC. 8. *Be it further enacted*, That the clerk of the court shall, at the request of the receiver, from time to time, issue writs of garnishment, directed to one or more persons, commanding them to appear at the then sitting, or at any future term of the court, and to answer under oath what property or effects of any alien enemy he had at the service of the process, or since has had under his possession or control belonging to or held for an alien enemy, or in what sum, if any, he is or was at the time of service of the garnishment, or since has been indebted to any alien enemy, and the court shall have power to condemn the property or effects, or debts, according to the answer, and to make such rules and orders for the bringing in of third persons claiming or disclosed by the answer to have an interest in the litigation as to it shall seem proper; but in no case shall any one be heard in respect thereto until he shall, by sworn plea, set forth substantially the matters before required of parties pleading. And the decree or judgment of the court, rendered in conformity to this act, shall forever protect the garnishee in respect to the matter involved. And in all cases of garnishment under this act, the receiver may test the truth of the garnishee's answer by filing a statement, under oath, that he believes the answer to be untrue, specifying the particulars in which he believes the garnishee has, by omission or commission, not answered truly; whereupon the court shall cause an issue to be made between the receiver and garnishee, and judgment rendered as upon the trial of other issues. And in all cases of litigation under this act the receiver may propound interrogatories to the adverse party touching any matter involved in the litigation, a copy of which shall be served on the opposite party or his attorney, and which shall be answered under oath within thirty days of such service, and upon failure so to answer, the court shall make such disposition of the cause as shall to it seem most promotive of justice, or should it deem answers to the interrogatories necessary in order to secure a discovery, the court shall imprison the party in default until full answers shall be made.

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SEC. 9. It shall be the duty of the District Attorney of the Confederate States diligently to prosecute all causes instituted under this act, and he shall receive as a compensation therefor two per cent. upon and from the fruits of all litigation instituted under this act: *Provided*, That no matter shall be called litigated except a defendant be admitted by the court, and a proper plea be filed.

SEC. 10. *Be it further enacted*, That each receiver appointed under this act shall, at least every six months, and as much oftener as he may be required by the court, render a true and perfect account of all matters in his hands or under his control under the law, and shall make and state just and perfect accounts and settlements under oath of his collections of moneys and disbursements under this law, stating accounts and making settlements of all matters separately, in the same way as if he were administrator of several estates of deceased persons by separate appointments. And the settlements and decrees shall be for each case or estate separately, so that the transaction in respect to each alien enemy's property may be kept recorded and preserved separately. No settlement as above provided shall, however, be made until judgment or decree of sequestration shall have passed, but the court may at any time pending litigation, require an account of matters in litigation and in the possession of the receiver, and may make such orders touching the same as shall protect the interest of the parties concerned.

SEC. 11. When the accounts of any receiver shall be filed respecting any matter which has passed sequestration, the court shall appoint a day for settlement and notice thereof shall be published consecutively for four weeks in some newspaper near the place of holding the court, and the clerk of the court shall send a copy of such newspaper to the District Attorney of the Confederate States, for the court, where the matter is to be heard, and it shall be the duty of said District Attorney to attend the settlement and represent the government and to see that a full, true and just settlement is made. The several settlements preceding the final one shall be interlocutory only, and may be impeached at the final settlements, which latter shall be conclusive, unless reversed or impeached within two years, for fraud.

SEC. 12. *Be it further enacted*, That the court having jurisdiction of the matter shall, whenever sufficient cause is shown therefor, direct the sale of any personal property, other than slaves, sequestered under this act, on such terms as to it shall seem best, and such sale shall pass the title of the person as whose property the same has been sequestered.

SEC. 13. All settlements of accounts of receivers for sequestered property shall be recorded and a copy thereof shall be forwarded by the clerk of the court to the Treasurer of the Confederate States within ten days after the decree, interlocutory or final, has been passed; and all balances found against the receiver shall by him be paid over into the court, subject to the order of the Treasurer of the Confederate States, and upon the failure of the receiver for five days to pay over the same, execution shall issue therefor, and he shall be liable to attachment by the court and to suit upon his bond. And any one embezzling any money under this act shall be liable to indictment, and on conviction shall be confined at hard labor for not less than six months nor more than five years, in the discretion of the court, and fined in double the amount embezzled.

SEC. 14. *Be it further enacted*, That the President of the Confederate States shall, by and with the advice and consent of Congress, or of the Senate, if the appointment be made under the permanent Government, appoint three discreet Commissioners, learned in the law, who shall hold at the seat of Government two terms each year, upon notice given, who shall sit so long as the business before them shall require; whose duty it shall be, under

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such rules as they may adopt, to hear and adjudge such claims as may be brought before them by any one aiding this Confederacy in the present war against the United States, who shall allege that he has been put to loss under the act of the United States, in retaliation of which this act is passed, or under any other act of the United States, or of any State thereof, authorizing the seizure, condemnation or confiscation of the property of any citizen or resident of the Confederate States, or other person aiding said Confederate States in the present war with the United States, and the finding of such Commissioners in favor of any such claim shall be *prima facie* evidence of the correctness of the demand, and whenever Congress shall pass the claim, the same shall be paid from any money in the Treasury derived from sequestration under this act; *Provided*, That said Board of Commissioners shall not continue beyond the organization of the Court of Claims, provided for by the Constitution; to which Court of Claims the duties herein provided to be discharged by Commissioners shall belong upon the organization of said Court. The salaries of said Commissioners shall be at the rate of two thousand five hundred dollars per annum, and shall be paid from the Treasury of the Confederacy. And it shall be the duty of the Attorney General or his assistant to represent the interests of this Government in all cases arising under this act before said Board of Commissioners.

SEC. 15. *Be it further enacted*, That all expenses incurred in proceedings under this act shall be paid from the sequestered fund, and the Judges, in settling accounts with Receivers, shall make to them proper allowances of compensation, taking two and a half per cent. on receipts, and the same amount on expenditures, as reasonable compensation, in all cases. The fees of the officers of court shall be such as are allowed by law for similar services in other cases, to be paid, however, only from the sequestered fund; *Provided*, That all sums realized by any Receiver in one year for his services, exceeding five thousand dollars, shall be paid into the Confederate Treasury, for the use of the Confederacy.

SEC. 16. *Be it further enacted*, That the Attorney General shall prescribe such uniform rules of proceeding under this law, not herein otherwise provided for, as shall meet the necessities of the case.

SEC. 17. *Be it further enacted*, That appeals may lie from any final decision of the court under this law, in the same manner and within the same time as is now, or hereafter may be by law prescribed for appeals in other civil cases.

SEC. 18. *Be it further enacted*, That the word "person" in this law includes all private corporations; and in all cases, when corporations become parties, and this law requires an oath to be made, it shall be made by some officer of such corporation.

SEC. 19. *Be it further enacted*, That the courts are vested with jurisdiction, and required by this act, to settle all partnerships heretofore existing between a citizen and one who is an alien enemy; to separate the interest of the alien enemy, and to sequestrate it. And shall, also, sever all joint rights when an alien enemy is concerned, and sequestrate the interest of such alien enemy.

SEC. 20. *Be it further enacted*, That in all cases of administration of any matter or thing, under this act, the court having jurisdiction may make such orders touching the preservation of the property or effects under the direction or control of the Receiver, not inconsistent with the foregoing provisions, as to it shall seem proper. And the Receiver may, at any time, ask and have the instructions of the court, or Judge, respecting his conduct in the disposition or management of any property or effects under his control.

SEC. 21. That the Treasury notes of this Confederacy shall be receivable in payment of all purchases of property or effects sold under this act.

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SEC. 22. *Be it further enacted*, That nothing in this act shall be construed to destroy or impair the lien or other rights of any creditor, a citizen or resident of either of the Confederate States, or of any other person, a citizen or resident, of any country, State, or Territory, with which this Confederacy is in friendship, and which person is not in actual hostility to this Confederacy. And any lien or debt claimed against any alien enemy, within the meaning of this act, shall be propounded and filed in the court, in which the proceedings of sequestration are had, within twelve months from the institution of such proceedings for sequestration; and the court shall cause all proper parties to be made and notices to be given, and shall hear and determine the respective rights of all parties concerned; *Provided, however*, That no sales or payments over of money shall be delayed for, or by reason of, such rights or proceedings; but any money realized by the Receiver, whether paid into the court, or Treasury, or still in the Receiver's hands, shall stand in lieu of that which produced said money, and be held to answer the demands of the creditors aforesaid, in the same manner as that which produced such money was. And all claims not propounded and filed as aforesaid, within twelve months as aforesaid, shall cease to *to* exist against the estate, property, or effects sequestrated, or the proceeds thereof.

Approved August 30, 1861.

On the 23d of December, 1861, the Confederates passed

CHAP. XVII. — *An Act in relation to Taxes on Property which has been, or which is liable to be sequestered as the Property of alien Enemies.*

The Congress of the Confederate States of America do enact, as follows: That it shall be the duty of the Receivers under the sequestration act, to pay all taxes upon property of alien enemies, which is liable therefor, within their respective districts, out of any funds in their hands as receivers, said payment to be charged to the account of the property upon which the tax has been paid: *Provided, however*, If it appear to any Receiver that such property, in any case, is not worth more than the taxes for which it is liable, he shall report the facts to the Secretary of the Treasury, whose duty it shall be to instruct the Receiver whether he shall pay the taxes or allow the property to be sold for the taxes.

SEC. 2. That the Receivers be authorized to sell by order of court, and in such manner, and upon such terms, as the court may prescribe, any property within their respective districts, which has been sequestered, or which is liable thereto, for the purpose of raising money for the payment of the taxes aforesaid.

SEC. 3. That whenever a Receiver has not funds in hand, over and above what is necessary for other expenditures, sufficient to pay said taxes, and cannot obtain the same by sale as aforesaid, within the time fixed for the payment of said taxes, he is hereby authorized to give, to the tax collector charged with the collection of the taxes, a certificate of the amount due, and he shall specify therein the property upon which the same is due; and the Secretary of the Treasury shall pay the amount so certified to be due, and shall cause the same to be charged to the sequestration fund. But the giving of the certificate shall be subject to the same condition precedent as provided in regard to payment in the first section of this act.

SEC. 4. That the Secretary of the Treasury be authorized to make agreements with the several States, counties, cities and towns for the postponement of the collection of taxes for which the property of alien enemies is sequestered, or liable to be; and in case any one or more of the States, coun-

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ties, cities or towns consent to the same, he is hereby empowered to issue certificates for the amount due, bearing interest at the rate of six per cent. per annum, which shall bind the government to pay the same, and which, when paid, shall be charged to the sequestration fund.

SEC. 5. That whenever the property of an alien enemy sequestered, or liable thereto, has been, or shall hereafter be, sold for taxes, the Secretary of the Treasury is hereby authorized, with the assent of the State in which the property has been sold, to redeem the same by the payment of the sum or sums required to be paid by citizens in such case, or by the issue of certificates therefor, as hereinbefore provided, should he deem it advisable, and in all such cases, such property shall go into the hands of the Receiver for the district in which the same is situate, and be held and accounted for in the same manner as other sequestered property; provided the amount of the redemption shall be charged to the sequestration fund.

Approved December 23, 1861.

On the 15th of February, 1862, the Confederates passed

CHAP. LXXI. — *An Act to alter and amend an Act entitled "An Act for the Sequestration of the Estates, Property and Effects of alien Enemies, and for Indemnity of Citizens of the Confederate States, and Persons aiding the same in the existing War with the United States," approved August thirtieth, eighteen hundred and sixty-one.*

The Congress of the Confederate States of America do enact, That all and every the lands, tenements and hereditaments, goods and chattels, rights and credits, and every right and interest therein embraced by said act of sequestration, of which this act is an alteration and amendment, shall be collected and sold, as provided for in this act, and the proceeds paid into the Treasury of the Confederate States; but in no case shall a debt, or other chose in action, be sold.

SEC. 2. *Be it further enacted,* That all money realized under this act, and the act to which it is an amendment, shall be applied to the equal indemnity of all persons, loyal citizens of the Confederate States, or persons aiding the same in the present war, who have suffered, or may hereafter suffer, loss or damage by confiscation, by the Government of the United States, or by any State government, or pretended government, acknowledging and aiding the Government of the United States in this war, or by such acts of the enemy, or other causes incident to the war, as, by future act of Congress, may be described or defined, as affording, under the circumstances, proper cases for indemnity. And all money realized as aforesaid, shall be paid into the Treasury of said Confederate States, as provided by the act to which this is an amendment; and the faith of the Confederate States is hereby pledged that the same shall be refunded, as required for the purposes aforesaid. And the Secretary of the Treasury shall cause a separate account of said money to be kept in well bound books procured for that purpose.

SEC. 3. *Be it further enacted,* That it shall be the duty of every person in actual possession of, or having under his control, any money, property, effects or evidences of debt, belonging to an alien enemy, speedily to inform the receiver, and to render an account thereof, and at once to pay over to the receiver, and to deliver to him such property and effects, and evidences of debt, and such payment and delivery shall be made without regard to whether any proceedings have or have not been instituted to sequestrate the same. And any person who, after giving such information, shall fail so to pay over and deliver on demand, made by the receiver, shall stand in contempt, and

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the receiver shall at once move the court or judge to proceed against such party as in other cases of contempt; and the court or judge may imprison the offender until he shall fully comply with the requirements of this act. And such payment or delivery shall fully acquit and discharge the party from all and every claim for or on account of such money, property, effects and evidences of debt. And the receiver shall give such person a receipt, specifying the amount of money, the property, effects and evidences of debt paid and delivered, and the name of the alien enemy on account of whom the same shall be paid and delivered: *Provided*, That when the person having the possession or control of any money of an alien enemy, asserts a debt or claim against such alien enemy in his own favor, he may file it in writing in the proper court, swearing that he believes himself justly entitled to the same, and thereupon he shall not be compelled, in the first instance, to pay over to the receiver the amount thus propounded and claimed by him; but the court shall then proceed to examine and try the validity of the said debt or claim, and decree according to the facts found, and the rights and justice of the case. And if the court decides against the debt or claim, the party setting up the same shall forthwith pay over the sum so retained by him. And if the court shall decree in favor of the debt or claim thus propounded, and it exceeds the entire amount originally in possession of such debtor or claimant, he shall pay no costs; otherwise he shall pay all costs incident to the proceedings.

SEC. 4. This act, and the act to which it is an amendment, shall not operate to avoid any payment, *bonâ fide* made to an alien enemy, or to affect property of any kind, *bona fide* and absolutely transferred, or conveyed, by an alien enemy to a faithful citizen of the Confederate States, prior to the thirtieth day of August, eighteen hundred and sixty-one.

SEC. 5. In cases of partnership property and effects, the resident partner, or partners, shall be dealt with in all respects as surviving partners in cases of a dissolution of partnership by the death of one or more of the partners, according to the laws of the place of the principal place of business of the partnership; and the receiver shall have the same remedies against such resident partners as the representatives of a deceased partner would be entitled to in like case.

SEC. 6. The following persons shall not be taken to be alien enemies under this act, or the act to which this is an amendment:

First. Persons who now have *bona fide* become permanent residents of any State of this Confederacy, and are actually residing and domiciled within the same, yielding and acknowledging allegiance thereto, and who have not, during the present war, voluntarily contributed to the cause of the enemy.

Second. All persons born within any State of this Confederacy, or natives of a neutral country, who since the breaking out of the war, have abandoned their domiciles and ceased their business in the enemy's country, and all persons aforesaid who have *bona fide* commenced, or attempted to remove themselves and effects from the enemy's country, and who have been, and still are prevented from completing said removal by the force or power of the enemy, or who from physical infirmity are incapable of removing.

Third. All subjects or citizens of neutral countries who cannot be shown to have voluntarily contributed to the cause of the enemy, and all persons who, though citizens of the enemy's country, have abandoned that country on account of their opposition to the war, or sympathy for the people of the Confederate States.

Fourth. All married women natives of any State of this Confederacy, who, or whose husbands shall not be shown to have voluntarily contributed to the cause of the enemy. All persons *non compos mentis*, and all minors

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whose fathers or mothers, were, or are, natives of this Confederacy and whose property and persons are controlled by guardians resident in the Confederate States, and who have not voluntarily contributed to the enemy's cause; and all minors under the age of sixteen years, who were born in any State of this Confederacy, or in any State exempted from the operations of this act while their parents were domiciled in such State and who have not taken up arms against the Confederate States.

Fifth. Free persons of color, who, by the laws of any State have been compelled to remove beyond the limits thereof, and are by law prohibited from returning to such State, and who have not in anywise aided the enemy.

SEC. 7. The next of kin in the direct ascending and descending lines of any alien enemy, faithful citizens of any of the Confederate States, or engaged in their military or naval service shall be entitled to have decreed them (they paying all costs) the property, effects and credits of such alien enemy as if dead, intestate, leaving no other heirs or distributees, chargeable, however, in their hands, as in case of administration or heirship, with the debts of such alien enemies due to faithful citizens of any Confederate State.

SEC. 8. All sales of property under this act shall be made by the receivers at public auction to the highest bidder and on such terms and such notice of the time and place of sale as the court may prescribe, and shall be duly reported to the court by such receivers at the term next after such sale; but no conveyance of title shall be made to the purchaser of the property until the confirmation of the sale by the court and the payment of the purchase money according to the terms of the sale; and no sale shall be valid until reported to, and confirmed by the court; nor shall any sale be confirmed until the terms shall have been complied with; and the court may set aside such sale for fraud, want of proper notice, or any material irregularity, or where it shall appear that the receiver was the purchaser or interested in the purchase, or for substantial inadequacy of price: *Provided, however*, That sales of personalty may be reported to, and confirmed by the judge in vacation.

SEC. 9. The court may, in its discretion, when special circumstances exist which temporarily depress the value of the property, delay the order of sale, or may direct the receiver to examine and report whether it would be expedient to make an immediate sale of such property, and on such report, or other satisfactory evidence, showing that a delay in the sale would tend to secure a fairer price, may order such sale to be delayed, and in all such cases the court may, in the case of real estate, or of a plantation and slaves, order the receiver to lease the same on such terms as the court may prescribe.

SEC. 10. In cases where an alien enemy may have contracted in writing, before the twenty-first day of May, eighteen hundred and sixty-one, to sell real estate to a citizen, or citizens, of this Confederacy, and to make title upon payment of the purchase money, the court, in decreeing sequestration of the said purchase money, or the residue thereof unpaid, shall further decree that the receiver of the district, in which said real estate is situate, shall, upon payment of said purchase money, or the residue thereof, as aforesaid, make title for such real estate to the purchaser or his assignee.

SEC. 11. The court shall audit and pass on the accounts of the receiver as provided in this act, and the one to which this is an amendment; but in lieu of the compensation and allowances herein provided for, shall allow such compensation as shall to it seem reasonable and just, following, in this respect, so far as may be applicable, the analogies furnished by the laws of the State in which the court is held, concerning compensation to executors, administrators, and trustees; and the court shall further allow to the receiver all proper expenses attending the execution of his office. And all

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fees and allowances passed by the court in favor of any receiver may be retained by him from any money in his hands; and all fees and allowances to any receiver beyond the rate of five thousand dollars per annum, except for expenses as aforesaid, shall be forthwith paid by him into the Confederate Treasury, to the use of the Confederate States, and shall be brought into, and stated and accounted for in his next account of settlement as receiver.

SEC. 12. The court shall appoint an attorney for each section in which the court shall be holden, and in which no attorney of the Confederate States resides, whose duties it shall be to discharge, within said section, the duties imposed on the attorney of the district by the act to which this is amendatory; and the compensation of such attorney so appointed shall be the same for business by him done as is now provided, by ninth section of said act, for the district attorney.

SEC. 13. The receiver shall, in all cases, take the possession and control of the money, property and effects of alien enemies, and of such choses in action as shall be in the hands of any agent or third person, except when otherwise provided by this act, and, on being refused possession, shall sue for the same, and such possession shall not be withheld on any pretext of any provisions of the act to which this is amendatory. The court may order a delay in the sale of property when it shall be necessary to complete or gather a growing crop, or when it shall be otherwise manifestly to the benefit of the Confederate States to delay the sale; but in all such cases the possession, control and management shall be with the receiver, or under his control and authority. And in the collection of debts or choses in action, no State stay law shall govern, but the same shall be governed by this act, and the one to which this is an amendment, so far as the latter does not conflict with this act.

SEC. 14. It shall be the duty of all persons owing debts to alien enemies, within three months from the passage of this act, to give information thereof to the receiver of the district in which he or they reside, and in case of corporations or joint stock companies, to the receiver of the district in which the principal office of business of such corporation or company may be; and such information shall be in writing and sworn to by the debtor, and in case of corporations or joint stock companies, by the principal officer of such corporation or company, before any judge of a court of record, justice of the peace, notary public, commissioner of the court or receiver under the act to which this is an amendment, and shall set forth the name or names of the creditor or owner of such debt, the amount he owes or owed on the thirtieth day of August, eighteen hundred and sixty-one, and whether the same is, or has been, secured by mortgage or otherwise; and the information or confession so made shall be filed by the receiver in the proper court of the Confederate States, and such court shall, on such information, proceed to decree sequestration and payment of the debt or debts so confessed; and in case any debtor shall, in good faith, confess his indebtedness as aforesaid, but shall be unable to state the true amount of his indebtedness, or shall be in doubt whether the creditor or owner of the debt is an alien enemy, the court shall proceed to ascertain the character of the creditor or owner, and the true amount of such indebtedness, and to that end shall direct such proceedings as shall be adapted to the nature of the case, and decree according to the facts found. And in all proceedings against persons for debts due by them to alien enemies, the debtor shall be allowed to make any defence in law or equity, which he might or could have made in a suit brought against him by the creditor to whom such debt was due: *Provided, however*, That no execution shall issue on such decree, except for

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the interest which shall accrue on the same at the end of each year, until twelve months after peace shall be declared between the Confederate States and the United States, or until otherwise directed by law: *And provided, moreover*, That execution may issue for the costs of the proceeding, and the sum so collected for costs shall be deducted from the principal sum due.

SEC. 15. The receivers appointed under this act, or the act to which this is an amendment, shall proceed diligently to ascertain and collect the debts due to alien enemies by persons residing in the districts for which they are severally appointed, and shall, on the discovery of any such debts, and after the expiration of three months from the passage of this act, and the debtor shall have failed to give information of such debt, proceed to institute proceedings to sequestrate the same, and in such proceeding, which shall be by petition, as prescribed by said act, to which this is an amendment, and shall be to sequestrate the debt, as well as to ascertain the sum due by the debtor, such debtor shall be made defendant or respondent, as the case may be, and the process to bring such debtor before the court, or to compel an answer, shall be in the nature of the writ of garnishment as prescribed in said act, which shall be served on such debtor; and in case of corporations and joint stock companies, on some member or officer of such corporation or company; and shall require the defendant to answer on oath whether he is indebted to any alien enemy, or was so indebted on the thirtieth day of August, eighteen hundred and sixty-one, in what sum, and whether he knows of any other person or persons so indebted, and, on the disclosure by the defendant of such indebtedness by other persons, like proceedings shall be had as in the original cause; and in case the defendant shall suggest in his answer that the debt due by him or her is claimed or owned by any person not an alien enemy, setting forth the name of such claimant, his place of abode, citation shall issue to such claimant to appear and propound his claim on oath, at the succeeding term of the court; and in case he is absent from the district in which the court is held, or cannot be found, publication shall be made for the space of one month in some newspaper best calculated to apprise such claimant to appear and propound his claim; and if such claimant shall fail to appear, his claim shall be barred. On the appearance of the claimant, the court shall direct an issue to try the same, and shall award the costs against the claimant if the claim be unfounded: *Provided*, That the entire answer shall be considered by the court.

SEC. 16. All proceedings now pending under the act to which this act is an amendment, shall be made to conform to the proceedings directed in this act, so far as practicable, and the judgments rendered therein shall be given in all respects, and have the same operation and effect, as judgments rendered under the fourteenth section of this act.

SEC. 17. In all proceedings against debtors who fail or refuse to give information of their indebtedness within the time prescribed in this act, and the debtor shall be brought before the court by process, the costs of the proceeding shall be adjudged against such debtor, in case he is found to be indebted to any alien enemy; and if it shall appear to the court, on the trial of any cause against such recusant debtor, that he has wrongly and wilfully refused or failed to give information of his indebtedness, or to state the true amount thereof, with intent to hinder, evade, or delay the execution of this act, or the act to which this is an amendment, or the jury, in any cause or issue tried by them, shall certify that such debtor has wilfully failed or refused to give information of his indebtedness, or the true amount thereof, with the intent aforesaid, the court shall award execution against such debtor, on the decree or judgment, for the whole amount of the debt

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and the interest due thereon, together with the costs; in all other cases, however, execution shall be stayed until the peace aforesaid, except for interest which shall accrue.

SEC. 18. In cases where proceedings shall be instituted to sequestrate judgments or decrees already rendered, or of claims or debts upon which actions or suits may be pending, the court may, after the decree of sequestration, allow the receiver to prosecute such suit, action, decree, or judgment, in the name of the Confederate States of America; and in cases of suits or actions pending, or decrees or judgments rendered in the State courts, where, by the laws of such State, it may be admissible, such receiver may introduce the Confederate States of America in the proceedings, as a party to prosecute such suit or action, or enforce such decree or judgment; but in such cases execution shall issue for costs and interest only, until further provided by law, or twelve months after the conclusion of peace as aforesaid.

SEC. 19. Attorneys, agents or trustees of any alien enemy, having claims for fees or commission on the fund or assets in their hands, shall, on delivery of such fund or assets to the receiver, make out their accounts for such claims or commissions, and the court shall consider and allow the same, if just and reasonable, to be paid out of such funds or assets; and where counsel are already engaged in prosecuting such pending suits or actions, the receiver shall be authorized to allow them to continue to prosecute such suits or actions for the Confederate States of America.

SEC. 20. The rate of interest to be paid by debtors shall be regulated by the contract, if by the terms thereof the rate of interest shall be fixed, and if no interest shall be fixed by the contract, then the rate shall be according to the law of the place where the debt is to be paid or the contract performed; and the judgment or decree shall bear the same rate of interest fixed by law or the contract, and the same shall be punctually paid at the end of each year, or execution shall issue for the same.

SEC. 21. In no case shall the judgment or decree be a lien on the property of the debtor; but where the court shall award execution under this act, the property of the debtor shall be bound, from the delivery of the writ.

SEC. 22. The court, or judge in vacation, shall have power to award execution on any judgment or decree, in addition to the cases of recusant debtors, where the receiver shall make oath that the debtor is fraudulently concealing or disposing of his effects, with intent to evade the judgment, or is about to remove his effects beyond the jurisdiction of the court, but such execution shall be discharged on the defendant's giving security, to the satisfaction of the court, for the performance or payment of the decree.

SEC. 23. In proceedings under this act, and the act of which it is amendatory, upon affidavit being made by the attorney representing the Confederate States, or the proper receiver, that the name of an alien enemy is wholly or partly unknown to him, or that the names of the members of a partnership of alien enemies are unknown to him, the process and proceedings may be against such partnership by the firm name thereof, stated in such affidavit, or against such alien enemy, whose name is wholly or partly unknown, by such name or proper description as may be known and set forth in such affidavit: *Provided*, That the court may, at any time, on motion, cause the full and proper name to be inserted in the record, and used in the proceedings, when the same become known to the court.

SEC. 24. Receivers shall have authority to administer oaths touching any matter incident to proceedings under this act.

SEC. 25. The sixteenth section of the act to which this is amendatory, is hereby repealed.

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SEC. 26. All debts due to any alien enemy may be paid in the bonds and treasury notes of the Confederate States, and the same shall be received in payment for all property sold under this act.

SEC. 27. The fees of all clerks and marshals shall be the same for services under this act, and the act to which this is an amendment, as are allowed for similar services in the courts of the Confederate States, and shall be a charge upon the general fund derived from confiscations, and shall be paid on the order of the court.

SEC. 28. The commissioners authorized by the fourteenth section of the act to which this is an amendment, shall appoint a clerk with a salary of fifteen hundred dollars, to be paid out of the treasury of the Confederate States; but such salary, as well as the salary of said commissioners, shall be charged to the confiscation fund and be deducted therefrom; and said commissioners shall moreover have power to appoint commissioners to take the examination of witnesses touching the claims which may be propounded before them, or may summon witnesses before them to be examined orally; said commissioners, and the commissioners appointed by them to examine witnesses as aforesaid, shall have power to administer oaths to the witnesses and to issue subpœnas, and witnesses failing to appear shall be subject to like penalties and process as may be prescribed in the courts of the Confederate States against defaulting witnesses: *Provided, however*, That the costs of all proceedings to take testimony shall be paid by the claimant, except in cases where the Attorney General shall apply for leave to take testimony, and the fees of witnesses and commissioners shall be the same as are allowed in the courts of the Confederate States in like cases.

SEC. 29. So much of the act to which this is an amendment as requires the receivers to settle separately the estate of each alien enemy, is repealed, and hereafter each settlement shall embrace all the matters ready for settlement; but the items of the account shall be so specific as to show the sources from which each is derived.

SEC. 30. Where any judgment has been entered up in any of the courts of the Confederate States, under the act to which this is an amendment, inconsistent with the provisions and spirit of this act, the same, on motion, shall be set aside or amended in accordance with the terms and provisions of this act.

SEC. 31. The provisions of the act to which this act is an amendment, so far as the same may conflict with this act, are hereby repealed.

Approved February 15, 1862.

By examination of the foregoing acts, it is seen that the Confederate Congress passed laws under a Constitution which was, word for word, the same as ours, so far as relates to the restrictions upon its power of passing *ex post facto* laws, or *bills of attainder*, and to its power of declaring the punishment of treason, with the proviso that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But in none of these acts in which the lands of citizens of the Confederate States were made liable to sequestration, was the forfeiture thereof confined to the life estates of the owners. The Confederates found neither in the laws of nations nor in the Constitution, as they understood them, anything to prevent their enforcing against all who were residents in the rebel States, or were within their power, but did not acknowledge allegiance to their government, *the same belligerent rights over their*

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persons and their property as though they had been, in fact, alien enemies. They passed acts providing for the seizure and imprisonment of their persons; and the absolute confiscation of all their property, personal and real; and for depriving them of political and civil rights, declaring them alien enemies, although born on their soil, and natives of the Confederate States. They allowed their own citizens, faithful to the Confederacy, when next of kin, to inherit and possess all the property of their relatives, who refused allegiance to the rebels, as if they had been dead; and they made it a crime not to disclose and give up to the government all property of persons unfriendly to the Confederacy.

The penalties imposed by the statutes of the provisional government of the Confederate States, upon all persons, including non-combatants, who withheld allegiance from the rebels, were far more sweeping and severe than the acts of Congress against traitors. Yet it is not surprising to find that rebels, who justified the Confederates in passing laws depriving citizens of rebel States of all their civil and political rights, of their property, and their liberty, under certain articles of this Constitution, are now quite ready to deny to the United States the right, under the same articles of the same Constitution, to pass laws far less severe in punishment of far greater crimes.

CONSTITUTIONALITY OF CONFISCATION ACT. (Page 123.)

On page 123, the opinion is expressed that the confiscation act of 1862 is not within the prohibition of the Constitution. On this point it is presumed that no question will be hereafter raised. Chief Justice Chase, during the term of the Circuit Court at Richmond, held in 1868, delivered an important opinion in a case of confiscation of real estate under the act of July 17, 1862. He said that several cases arising under this act have been considered by the Supreme Court, and as the point was not raised, it was a fair conclusion that neither at the bar nor upon the bench was the constitutionality of the act doubted.

[No. 5. See pages 53, 292, 293, 295.]

BELLIGERENTS.

"*Whether Belligerents should be allowed Civil Rights under the Constitution, depends upon the Policy of the Government.*"

No opinion stated in this book was more earnestly questioned by leading statesmen and jurists at the time of its first publication, in 1862, than the one above quoted. Though the act of July 13, 1861, had been previously passed, which recognized *a state of war*, and declared non-intercourse with the insurrectionary districts, and though the President had issued his proclamation of August 16, 1861, in pursuance of this act, yet this view of our constitutional rights against the inhabitants of the rebel States, thus recog-

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nized as belligerents engaged in civil war, was, at that time, condemned by certain writers as "erroneous, dangerous, and revolutionary." Nevertheless, this interpretation of the war powers of the Union has finally been recognized and established. It has received the sanction of the several departments of the government, executive, legislative, and judicial. It is the basis on which the President has issued several proclamations, and upon which Congress has passed several acts in relation to the persons and property of rebels, depriving them of the rights enjoyed by citizens of the United States under the Constitution, and has also founded the system of laws called the Reconstruction Acts, for restoring equal rights to our public enemies upon terms and conditions therein prescribed.

In the Courts of the United States, prior to the civil war, it had been held that political questions could be decided only by the political departments of our government, and that the courts were bound to recognize and follow these decisions. (See pp. 294, 295, and authorities there cited.) And it had been also held that questions relating to the *status* of foreign countries, or to the recognition of State governments in the Union, under the clause of the Constitution which guarantees republican forms of government to the States, and that certain other questions of a national or international character, were of a political nature, and were therefore determinable only by the political departments of our government. No case had then arisen which required the courts to decide whether the government had the right, under any circumstances, to deprive citizens of the United States of any of the civil or political rights secured to them by the Constitution, except as a punishment for crimes, by law; or, in other words, to declare and determine that the political *status* of the inhabitants of any portion of the Union should be different from that which they had held as citizens in time of peace, under the Constitution and laws.

The constitutional power claimed in this essay for the government of *determining the political status* of the enemy, and of *giving or withholding civil and political rights*, according to the decisions of the *political* departments, received its earliest authoritative sanction in the opinions of the judges of the Supreme Court of the United States in the prize cases decided in 1863, within a year after the first edition of this essay was published. (See p. 141.) Since that date, several decisions of the same court have confirmed the doctrines of these cases. In addition to the authorities cited in notes to pp. 252, 293, 295, the following cases, which, except the first two, have been recently decided, may be added, as illustrative of the propositions assumed as the basis of the conclusion stated at the commencement of this note: —

Cherokee Nation v. *State of Georgia*, 5 Peters, 1.

State of Rhode Island v. *State of Massachusetts*, 12 Peters, 657. (See this case, as re-stated by Nelson, J., in the case of *Georgia* v. *Stanton*, 6 Wallace, 73.)

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The Venice, 2 Wallace, 274. (1864–5.)
Mrs. Alexander Cotton, 2 Wallace, 417. (1864–5.)
State of Mississippi v. *Johnson*, 4 Wallace, 497. (1866–7.)
The Peterhoff, 5 Wallace, 60. (1866–7.)
The *William Bagaley*, ib., 402–409. (1866.)
Mauran v. *Insurance Co.*, 6 Wallace, 14. (1867–8.)
State of Georgia v. *Stanton*, 6 Wallace, 71. (1868–9.)*

The government of the Confederate States assumed and acted upon the same view of the Constitution as that above stated. Their *Congress* determined, by statutes, the *political status* of all persons who refused to render allegiance to the Confederacy, and provided means for depriving all their enemies of property, liberty, or life. (See Notes pp. 409–424.)†

[No. 6. See page 57.]

MILITARY AND PROVISIONAL GOVERNMENTS. RECONSTRUCTION.

When this work was first published (in 1862), it was generally admitted by loyal citizens that the administration had a right to suppress rebellion, by employing military and naval forces, so far as they might be necessary to break up and disperse the armies of insurgents. It was also then supposed by some persons that the President, as commander-in-chief, might hold such districts of enemy territory as should come into our military possession, under the command of his army officers, *flagrante bello*. Whether he had any lawful authority, in those districts, over property or persons not engaged in carrying on hostilities against us, and not committing crimes punishable by martial law, was a question which had not then been solved. What, under this new condition of affairs, was the extent, and what were the limitations of the military power of the President or of his officers; how far he or they were bound by the local laws of the rebel States; whether those laws were still obligatory upon the inhabitants thereof; what were the legal rights of peaceable rebels, of neutrals, or of friends of the Union living there; what protection could be lawfully given to persons or property, without swerving from the purposes for which our defensive war was declared to have been commenced and carried on; whether all the laws of the United States, as, for instance, those regarding the return of fugitive slaves, were still obligatory upon our soldiers, as in time of peace; and whether the citizens of the rebellious States were still entitled to all their former rights under the Constitution, — were questions which embarrassed and disheartened our statesmen and jurists no less than our commanders and soldiers in the service. Whether Congress had the right to erect military or provisional governments

* For the above-cited cases, see Appendix.
† See Index — Military Government, Capture, Confiscation.

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over our conquered enemy, was a question which, at that early period of the war, had not become of sufficient practical importance to attract the attention of our public men. In the course of subsequent events the maintenance of that right became essential to the life of the nation, and is now the basis of the reconstructed Union. It was with a view of answering these and similar questions, and at the same time of vindicating the right of the country to use among its other war powers that of controlling by military governments those whom it should conquer, that this essay was written, in the firm belief that the time would come when our army and navy would regain possession of every portion of the States, and would then be able to govern their inhabitants by martial law. In these pages the constitutional power was claimed as rightfully belonging to the government to treat the inhabitants of States declared in rebellion, without exception or distinction, as belligerent public enemies; to liberate their slaves; to capture and confiscate their property; to hold them as a conquered people; to erect and maintain military and provisional governments over them during the pleasure of the conqueror. An exposition and application of these, with other war powers of the United States, were believed by the author to afford a solution of all questions relating to the civil and political rights of public enemies in time of war, and to the authority of the government over them.

It is doubtless true that the President, Congress, and the people of the loyal States were not at that time prepared to approve of these views. They advanced by slow and cautious steps to recognize and apply the laws of war. But as various emergencies arose, the necessity of acting upon them became manifest. Without the untrammelled use of all the means we possessed, we could not have conquered the rebels. If we had succeeded in dispersing their armies, we could never have reduced them to *bona fide* submission to the government, if, on laying down their arms, and without obtaining the assent of the loyal people of the United States, they had been held to be entitled, under the Constitution, to resume at their own will and pleasure, all their former civil and political rights and privileges in and relative to the Union; while, in fact, the power even of local governments of the rebel districts, formerly possessed by them, had passed out of their hands by civil war, and was vested in the United States. This power was exercised, while hostilities were *flagrant*, by the *commander-in-chief*, or his subordinate officers, whom he appointed as military governors of the several districts into which the rebel territory was divided. These military governors were succeeded by others, who were appointed by the President, under acts of Congress, which provided for new temporary governments. The first of these acts referred to in the note to page 65 was approved March 3, 1865, and is as follows. (See Stat. 1865, Chap. 90, p. 507.)

FREEDMEN'S BUREAU ACT.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established

* See letter to Mr. Eliot, relating to this act, p. 464.

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in the War Department, to continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands, to which shall be committed, as hereinafter provided, the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel States, or from any district of country within the territory embraced in the operations of the army, under such rules and regulations as may be prescribed by the head of the bureau, and approved by the President. The said bureau shall be under the management and control of a commissioner to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be three thousand dollars per annum, and such number of clerks as may be assigned to him by the Secretary of War, not exceeding one chief clerk, two of the fourth class, two of the third class, and five of the first class. And the commissioner and all persons appointed under this act, shall, before entering upon their duties, take the oath of office prescribed in an act entitled "An Act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and the commissioner and the chief clerk shall, before entering upon their duties, give bonds to the Treasurer of the United States, the former in the sum of fifty thousand dollars, and the latter in the sum of ten thousand dollars, conditioned for the faithful discharge of their duties respectively, with securities to be approved as sufficient by the Attorney General, which bonds shall be filed in the office of the first comptroller of the treasury, to be by him put in suit for the benefit of any injured party upon any breach of the conditions thereof.

SEC. 2. *And be it further enacted,* That the Secretary of War may direct such issues of provisions, clothing, and fuel, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children, under such rules and regulations as he may direct.

SEC. 3. *And be it further enacted,* That the President may, by and with the advice and consent of the Senate, appoint an assistant commissioner for each of the States declared to be in insurrection, not exceeding ten in number, who shall, under the direction of the commissioner, aid in the execution of the provisions of this act; and he shall give a bond to the Treasurer of the United States, in the sum of twenty thousand dollars, in the form and manner prescribed in the first section of this act. Each of said commissioners shall receive an annual salary of two thousand five hundred dollars in full compensation for all his services. And any military officer may be detailed and assigned to duty under this act without increase of pay or allowances. The commissioner shall, before the commencement of each regular session of Congress, make full report of his proceedings with exhibits of the state of his accounts to the President, who shall communicate the same to Congress, and shall also make special reports whenever required to do so by the President or either House of Congress; and the assistant commissioners shall make quarterly reports of their proceedings to the commissioner, and also such other special reports as from time to time may be required.

SEC. 4. *And be it further enacted,* That the commissioner, under the direction of the President, shall have authority to set apart, for the use of loyal refugees and freedmen, such tracts of land within the insurrectionary States as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise; and to every male citizen, whether refugee or freedman, as aforesaid, there shall be assigned not more than forty acres of such land, and the person to whom it was so assigned shall be protected in the use and enjoyment of the land for the term of three years at an annual rent not exceeding six per centum upon the

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value of such land, as it was appraised by the State authorities in the year eighteen hundred and sixty, for the purpose of taxation; and in case no such appraisal can be found, then the rental shall be based upon the estimated value of the land in said year, to be ascertained in such manner as the commissioner may by regulation prescribe. At the end of said term, or at any time during said term, the occupants of any parcels so assigned may purchase the land, and receive such title thereto as the United States can convey, upon paying therefor the value of the land, as ascertained and fixed for the purpose of determining the annual rent aforesaid.

SEC. 5. *And be it further enacted,* That all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.

Approved, March 3, 1865.

The operation of this law was extended by the following act of July 16, 1866. (Stat. 90, p. 173.)

CHAP. CC. — *An Act to continue in force and to amend "An Act to establish a Bureau for the Relief of Freedmen and Refugees," and for other Purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act to establish a bureau for the relief of freedmen and refugees, approved March third, eighteen hundred and sixty-five, shall continue in force for the term of two years from and after the passage of this act.

SEC. 2. *And be it further enacted,* That the supervision and care of said bureau shall extend to all loyal refugees and freedmen, so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of States, and by constitutional amendment, available to them and beneficial to the republic.

SEC. 3. *And be it further enacted,* That the President shall, by and with the advice and consent of the Senate, appoint two assistant commissioners, in addition to those authorized by the act to which this is an amendment, who shall give like bonds and receive the same annual salaries provided in said act, and each of the assistant commissioners of the bureau shall have charge of one district containing such refugees or freedmen, to be assigned him by the commissioner with the approval of the President. And the commissioner shall, under the direction of the President, and so far as the same shall be, in his judgment, necessary for the efficient and economical administration of the affairs of the bureau, appoint such agents, clerks, and assistants as may be required for the proper conduct of the bureau. Military officers or enlisted men may be detailed for service and assigned to duty under this act; and the President may, if in his judgment safe and judicious so to do, detail from the army all the officers and agents of this bureau; but no officer so assigned shall have increase of pay or allowances. Each agent or clerk, not heretofore authorized by law, not being a military officer, shall have an annual salary of not less than five hundred dollars, nor more than twelve hundred dollars, according to the service required of him. And it shall be the duty of the commissioner, when it can be done consistently with public interest, to appoint, as assistant commissioners, agents, and clerks, such men as have proved their loyalty by faithful service in the armies of the Union during the rebellion. And all persons appointed to service under this act and the act to which this is an amendment, shall be

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so far deemed in the military service of the United States as to be under the military jurisdiction, and entitled to the military protection, of the government while in discharge of the duties of their office.

SEC. 4. *And be it further enacted,* That officers of the veteran reserve corps or of the volunteer service, now on duty in the Freedmen's Bureau as assistant commissioners, agents, medical officers, or in other capacities, whose regiments or corps have been or may hereafter be mustered out of service, may be retained upon such duty as officers of said bureau, with the same compensation as is now provided by law for their respective grades; and the Secretary of War shall have power to fill vacancies until other officers can be detailed in their places without detriment to the public service.

SEC. 5. *And be it further enacted,* That the second section of the act to which this is an amendment shall be deemed to authorize the Secretary of War to issue such medical stores or other supplies and transportation, and afford such medical or other aid as here may be needful for the purposes named in said section: *Provided,* That no person shall be deemed "destitute," "suffering," or "dependent upon the government for support," within the meaning of this act, who is able to find employment, and could, by proper industry or exertion, avoid such destitution, suffering, or dependence.

SEC. 6. Whereas, by the provisions of an act approved February sixth, eighteen hundred and sixty-three, entitled "An Act to amend an act entitled 'An Act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' approved June seventh, eighteen hundred and sixty-two," certain lands in the parishes of St. Helena and Saint Luke, South Carolina, were bid in by the United States at public tax sales, and by the limitation of said act the time of redemption of said lands has expired; and whereas, in accordance with instructions issued by President Lincoln on the sixteenth day of September, eighteen hundred and sixty-three, to the United States direct tax commissioners for South Carolina, certain lands bid in by the United States in the parish of Saint Helena, in said State, were in part sold by the said tax commissioners to "heads of families of the African race," in parcels of not more than twenty acres to each purchaser; and whereas, under said instructions, the said tax commissioners did also set apart as "school farms" certain parcels of land in said parish, numbered on their plats from one to thirty-three, inclusive, making an aggregate of six thousand acres, more or less: Therefore, *be it further enacted,* That the sales made to "heads of families of the African race," under the instructions of President Lincoln to the United States direct tax commissioners for South Carolina, of date of September sixteenth, eighteen hundred and sixty-three, are hereby confirmed and established; and all leases which have been made to such "heads of families" by said direct tax commissioners, shall be changed into certificates of sale in all cases wherein the lease provides for such substitution; and all the lands now remaining unsold, which come within the same designation, being eight thousand acres, more or less, shall be disposed of according to said instructions.

SEC. 7. *And be it further enacted,* That all other lands bid in by the United States at tax sales, being thirty-eight thousand acres, more or less, and now in the hands of the said tax commissioners as the property of the United States, in the parishes of Saint Helena and Saint Luke, excepting the "school farms," as specified in the preceding section, and so much as may be necessary for military and naval purposes at Hilton Head, Bay Point, and Land's End, and excepting also the city of Port Royal, on Saint Helena Island, and the town of Beaufort, shall be disposed of in parcels of

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twenty acres, at one dollar and fifty cents per acre, to such persons and to such only as have acquired and are now occupying lands under and agreeably to the provisions of General Sherman's special field order, dated at Savannah, Georgia, January sixteenth, eighteen hundred and sixty-five; and the remaining lands, if any, shall be disposed of in like manner to such persons as had acquired lands agreeably to the said order of General Sherman, but who have been dispossessed by the restoration of the same to former owners: *Provided*, That the lands sold in compliance with the provisions of this and the preceding section shall not be alienated by their purchasers within six years from and after the passage of this act.

SEC. 8. *And be it further enacted*, That the "school farms" in the parish of Saint Helena, South Carolina, shall be sold, subject to any leases of the same, by the said tax commissioners, at public auction, on or before the first day of January, eighteen hundred and sixty-seven, at not less than ten dollars per acre; and the lots in the city of Port Royal, as laid down by the said tax commissioners, and the lots and houses in the town of Beaufort, which are still held in like manner, shall be sold at public auction; and the proceeds of said sales, after paying expenses of the surveys and sales, shall be invested in United States bonds, the interest of which shall be appropriated, under the direction of the commissioner, to the support of schools, without distinction of color or race, on the islands in the parishes of Saint Helena and Saint Luke.

SEC. 9. *And be it further enacted*, That the assistant commissioners for South Carolina and Georgia are hereby authorized to examine all claims to lands in their respective States which are claimed under the provisions of General Sherman's special field order, and to give to each person having a valid claim a warrant upon the direct tax commissioners for South Carolina for twenty acres of land; and the said direct tax commissioners shall issue to every person, or to his or her heirs, but in no case to any assigns, presenting such warrant, a lease of twenty acres of land, as provided for in section seven, for the term of six years; but at any time thereafter, upon the payment of a sum not exceeding one dollar and fifty cents per acre, the person holding such lease shall be entitled to a certificate of sale of said tract of twenty acres from the direct tax commissioner or such officer as may be authorized to issue the same; but no warrant shall be held valid longer than two years after the issue of the same.

SEC. 10. *And be it further enacted*, That the direct tax commissioners for South Carolina are hereby authorized and required at the earliest day practicable to survey the lands designated in section seven into lots of twenty acres each, with proper metes and bounds distinctly marked, so that the several tracts shall be convenient in form, and as near as practicable have an average of fertility and woodland; and the expense of such surveys shall be paid from the proceeds of sales of said lands, or, if sooner required, out of any moneys received for other lands on these islands, sold by the United States for taxes, and now in the hands of the direct tax commissioners.

SEC. 11. *And be it further enacted*, That restoration of lands occupied by freedmen under General Sherman's field order dated at Savannah, Georgia, January sixteenth, eighteen hundred and sixty-five, shall not be made until after the crops of the present year shall have been gathered by the occupants of said lands, nor until a fair compensation shall have been made to them by the former owners of such lands, or their legal representatives, for all improvements or betterments erected or constructed thereon, and after due notice of the same being done shall have been given by the assistant commissioner.

SEC. 12. *And be it further enacted*, That the commissioner shall have

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power to seize, hold, use, lease, or sell all buildings and tenements, and any lands appertaining to the same, or otherwise, formerly held under color of title by the late so-called Confederate States, and not heretofore disposed of by the United States, and any buildings or lands held in trust for the same by any person or persons, and to use the same or appropriate the proceeds derived therefrom to the education of the freed people; and whenever the bureau shall cease to exist, such of said so-called Confederate States as shall have made provision for the education of their citizens without distinction of color shall receive the sum remaining unexpended of such sales or rentals, which shall be distributed among said States for educational purposes in proportion to their population.

SEC. 13. *And be it further enacted*, That the commissioner of this bureau shall at all times co-operate with private benevolent associations of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction; and he shall furnish such protection as may be required for the safe conduct of such schools.

SEC. 14. *And be it further enacted*, That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color, or previous condition of slavery. And whenever in either of said States or districts the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and until such State shall have been restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States, the President shall, through the commissioner and the officers of the bureau, and under such rules and regulations as the President, through the Secretary of War, shall prescribe, extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights, and no penalty or punishment for any violation of law shall be imposed or permitted because of race or color, or previous condition of slavery, other or greater than the penalty or punishment to which white persons may be liable by law for the like offence. But the jurisdiction conferred by this section upon the officers of the bureau shall not exist in any State where the ordinary course of judicial proceedings has not been interrupted by the rebellion, and shall cease in every State when the courts of the State and the United States are not disturbed in the peaceable course of justice, and after such State shall be fully restored in its constitutional relations to the government, and shall be duly represented in the Congress of the United States.

SEC. 15. *And be it further enacted*, That all officers, agents, and employés of this bureau, before entering upon the duties of their office, shall take the oath prescribed in the first section of the act to which this is an

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amendment; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER,
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U. S., July 16, 1866.

The President of the United States having returned to the House of Representatives, in which it originated, the bill entitled "An Act to continue in force and to amend 'An Act to establish a bureau for the relief of freedmen and refugees,' and for other purposes," with his objections thereto, the House of Representatives proceeded, in pursuance of the Constitution, to reconsider the same; and

Resolved, That the said bill pass, two thirds of the House of Representatives agreeing to pass the same.

Attest: EDW. MCPHERSON,
Clerk of H. Rep. U. S.

IN THE SENATE OF THE UNITED STATES, July 16, 1866.

The Senate having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An Act to continue in force and to amend, 'An Act to establish a bureau for the relief of freedmen and refugees,' and for other purposes," returned to the House of Representatives by the President of the United States, with his objections, and sent by the House of Representatives to the Senate with the message of the President returning the bill:

Resolved, That the bill do pass, two thirds of the Senate agreeing to pass the same.

Attest: J. W. FORNEY,
Secretary of the Senate of the United States.

The most important of these laws related to military government, and are known as

THE RECONSTRUCTION ACTS,

of which the following are the most memorable.

CHAP. CLIII. — *An Act to provide for the more efficient Government of the Rebel States.*

Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said rebel States shall be divided into military districts, and made subject to the military authority of the United States as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama, and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.

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SEC. 2. *And be it further enacted*, That it shall be the duty of the President to assign to the command of each of said districts an officer of the army, not below the rank of brigadier general, and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority within the district to which he is assigned.

SEC. 3. *And be it further enacted*, That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals; and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act, shall be null and void.

SEC. 4. *And be it further enacted*, That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President.

SEC. 5. *And be it further enacted*, That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at common law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided*, That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States, shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such convention.

SEC. 6. *And be it further enacted*, That, until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or

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supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote, under the provisions of the fifth section of this act; and no person shall be eligible to any office under any such provisional governments who would be disqualified from holding office under the provisions of the third article of said constitutional amendment.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
LA FAYETTE S. FOSTER.
President of the Senate, pro tempore.

IN THE HOUSE OF REPRESENTATIVES,
March 2, 1687.

The President of the United States having returned to the House of Representatives, in which it originated, the bill entitled "An Act to provide for the more efficient government of the rebel States," with his objections thereto, the House of Representatives proceeded, in pursuance of the Constitution, to reconsider the same; and

Resolved, That the said bill do pass, two thirds of the House of Representatives agreeing to pass the same.

Attest: EDWD. MCPHERSON,
Clerk of H. R. U. S.

IN SENATE OF THE UNITED STATES,
March 2, 1867.

The Senate having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An Act to provide for the more efficient government of the rebel States," returned to the House of Representatives by the President of the United States, with his objections, and sent by the House of Representatives to the Senate, with the message of the President returning the bill:

Resolved, That the bill do pass, two thirds of the Senate agreeing to pass the same.

Attest: J. W. FORNEY,
Secretary of the Senate.

CHAP. VI. — *An Act supplementary to an Act entitled "An Act to provide for the more efficient Government of the Rebel States," passed March second, eighteen hundred and sixty-seven, and to facilitate Restoration.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That before the first day of September, eighteen hundred and sixty-seven, the commanding general in each district defined by an act entitled "An Act to provide for the more efficient government of the rebel States," passed March second, eighteen hundred and sixty-seven, shall cause a registration to be made of the male citizens of the United States, twenty-one years of age and upwards, resident in each county or parish in the State or States included in his district, which registration shall include only those persons who are qualified to vote for delegates by the act aforesaid, and who shall have taken and subscribed the following oath or affirmation: "I, ———, do solemnly swear (or affirm), in the presence of Almighty God, that I am a citizen of the State of———; that I have resided in said State for——— months next preceding this day, and now reside in the county of———, or the parish of———, in said State (as the case may be); that I am twenty-one years old; that I have not been disfranchised for participation in any rebellion or civil war against the United States, nor for felony committed against the laws of any State

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or of the United States; that I have never been a member of any State legislature, nor held any executive or judicial office in any State, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I have never taken an oath as a member of Congress of the United States, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof; that I will faithfully support the Constitution and obey the laws of the United States, and will, to the best of my ability, encourage others so to do, so help me God;" which oath or affirmation may be administered by any registering officer.

SEC. 2. *And be it further enacted*, That after the completion of the registration hereby provided for in any State, at such time and places therein as the commanding general shall appoint and direct, of which at least thirty days' public notice shall be given, an election shall be held of delegates to a convention for the purpose of establishing a constitution and civil government for such State loyal to the Union, said convention in each State, except Virginia, to consist of the same number of members as the most numerous branch of the State legislature of such State in the year eighteen hundred and sixty, to be apportioned among the several districts, counties, or parishes of such State by the commanding general, giving to each representation in the ratio of voters registered as aforesaid as nearly as may be. The convention in Virginia shall consist of the same number of members as represented the territory now constituting Virginia in the most numerous branch of the legislature of said State in the year eighteen hundred and sixty, to be apportioned as aforesaid.

SEC. 3. *And be it further enacted*, That at said election the registered voters of each State shall vote for or against a convention to form a constitution therefor under this act. Those voting in favor of such a convention shall have written or printed on the ballots by which they vote for delegates, as aforesaid, the words "For a convention," and those voting against such a convention shall have written or printed on such ballots the words "Against a convention." The persons appointed to superintend said election, and to make return of the votes given thereat, as herein provided, shall count and make return of the votes given for and against a convention; and the commanding general to whom the same shall have been returned shall ascertain and declare the total vote in each State for and against a convention. If a majority of the votes given on that question shall be for a convention, then such convention shall be held as hereinafter provided; but if a majority of said votes shall be against a convention, then no such convention shall be held under this act: *Provided*, That such convention shall not be held unless a majority of all such registered voters shall have voted on the question of holding such convention.

SEC. 4. *And be it further enacted*, That the commanding general of each district shall appoint as many boards of registration as may be necessary, consisting of three loyal officers or persons, to make and complete the registration, superintend the election, and make return to him of the votes, list of voters, and of the persons elected as delegates by a plurality of the votes cast at said election; and upon receiving said returns he shall open the same, ascertain the persons elected as delegates, according to the returns of the officers who conducted said election, and make proclamation thereof; and if a majority of the votes given on that question shall be for a convention, the commanding general, within sixty days from the date of election, shall notify the delegates to assemble in convention, at a time and

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place to be mentioned in the notification, and said convention, when organized, shall proceed to frame a constitution and civil government according to the provisions of this act, and the act to which it is supplementary; and when the same shall have been so framed, said constitution shall be submitted by the convention for ratification to the persons registered under the provisions of this act at an election to be conducted by the officers or persons appointed or to be appointed by the commanding general, as hereinbefore provided, and to be held after the expiration of thirty days from the date of notice thereof, to be given by said convention; and the returns thereof shall be made to the commanding general of the district.

SEC. 5. *And be it further enacted,* That if, according to said returns, the constitution shall be ratified by a majority of the votes of the registered electors qualified as herein specified, cast at said election, at least one half of all the registered voters voting upon the question of such ratification, the president of the convention shall transmit a copy of the same, duly certified, to the President of the United States, who shall forthwith transmit the same to Congress, if then in session, and if not in session, then immediately upon its next assembling; and if it shall moreover appear to Congress that the election was one at which all the registered and qualified electors in the State had an opportunity to vote freely and without restraint, fear, or the influence of fraud, and if the Congress shall be satisfied that such constitution meets the approval of a majority of all the qualified electors in the State, and if the said constitution shall be declared by Congress to be in conformity with the provisions of the act to which this is supplementary, and the other provisions of said act shall have been complied with, and the said constitution shall be approved by Congress, the State shall be declared entitled to representation, and senators and representatives shall be admitted therefrom as therein provided.

SEC. 6. *And be it further enacted,* That all elections in the States mentioned in the said "Act to provide for the more efficient government of the rebel States," shall, during the operation of said act, be by ballot; and all officers making the said registration of voters and conducting said elections shall, before entering upon the discharge of their duties, take and subscribe the oath prescribed by the act approved July second, eighteen hundred and sixty-two, entitled "An Act to prescribe an oath of office:" *Provided,* That if any person shall knowingly and falsely take and subscribe any oath in this act prescribed, such person so offending and being thereof duly convicted shall be subject to the pains, penalties, and disabilities which by law are provided for the punishment of the crime of wilful and corrupt perjury.

SEC. 7. *And be it further enacted,* That all expenses incurred by the several commanding generals, or by virtue of any orders issued, or appointments made, by them, under or by virtue of this act, shall be paid out of any moneys in the treasury not otherwise appropriated.

SEC. 8. *And be it further enacted,* That the convention for each State shall prescribe the fees, salary, and compensation to be paid to all delegates and other officers and agents herein authorized or necessary to carry into effect the purposes of this act not herein otherwise provided for, and shall provide for the levy and collection of such taxes on the property in such State as may be necessary to pay the same.

SEC. 9. *And be it further enacted,* That the word "article," in the sixth section of the act to which this is supplementary, shall be construed to mean "section."

SCHUYLER COLFAX,
Speaker of the House of Representatives.
B. F. WADE,
President of the Senate pro tempore.

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IN THE HOUSE OF REPRESENTATIVES, U. S., March 23, 1867.

The President of the United States having returned to the House of Representatives, in which it originated, the bill entitled "An Act supplementary to an act entitled 'An Act to provide for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and to facilitate restoration," with his objections thereto, the House of Representatives proceeded, in pursuance of the Constitution, to reconsider the same; and

Resolved, That the said bill do pass, two thirds of the House of Representatives agreeing to pass the same.

Attest:

EDWD. MCPHERSON,
Clerk H. R. U. S.

IN SENATE OF THE UNITED STATES, March 23, 1867.

The Senate having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An Act supplementary to an act entitled 'An Act to provide for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and to facilitate restoration," returned to the House of Representatives by the President of the United States, with his objections, and sent by the House of Representatives to the Senate, with the message of the President returning the bill:

Resolved, That the bill do pass, two thirds of the Senate agreeing to pass the same.

Attest:

J. W. FORNEY,
Secretary.

CHAP. XXX. — *An Act supplementary to an Act entitled "An Act to provide for the more efficient Government of the Rebel States, passed on the second day of March, eighteen hundred and sixty-seven, and the Act supplementary thereto, passed on the twenty-third day of March, eighteen hundred and sixty-seven.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to have been the true intent and meaning of the act of the second day of March, one thousand eight hundred and sixty-seven, entitled "An Act to provide for the more efficient government of the rebel States," and of the act supplementary thereto, passed on the twenty-third day of March, in the year one thousand eight hundred and sixty-seven, that the governments then existing in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas *were not legal State governments;* and that thereafter said governments, if continued, were to be continued subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.

SEC. 2. *And be it further enacted*, That the commander of any district named in said act shall have power, subject to the disapproval of the General of the army of the United States, and to have effect till disapproved, whenever in the opinion of such commander the proper administration of said act shall require it, to suspend or remove from office, or from the performance of official duties and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in such district under any power, elec-

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tion, appointment or authority derived from, or granted by, or claimed under, any so-called State or the government thereof, or any municipal or other division thereof, and upon such suspension or removal such commander, subject to the disapproval of the General as aforesaid, shall have power to provide from time to time for the performance of the said duties of such officer or person so suspended or removed, by the detail of some competent officer or soldier of the army, or by the appointment of some other person, to perform the same, and to fill vacancies occasioned by death, resignation, or otherwise.

SEC. 3. *And be it further enacted*, That the General of the army of the United States shall be invested with all the powers of suspension, removal, appointment, and detail granted in the preceding section to district commanders.

SEC. 4. *And be it further enacted*, That the acts of the officers of the army already done in removing in said districts persons exercising the functions of civil officers, and appointing others in their stead, are hereby confirmed: *Provided*, That any person heretofore or hereafter appointed by any district commander to exercise the functions of any civil office, may be removed either by the military officer in command of the district, or by the General of the army. And it shall be the duty of such commander to remove from office as aforesaid all persons who are disloyal to the government of the United States, or who use their official influence in any manner to hinder, delay, prevent, or obstruct the due and proper administration of this act, and the acts to which it is supplementary.

SEC. 5. *And be it further enacted*, That the boards of registration provided for in the act entitled "An Act supplementary to an Act entitled 'An Act to provide for the more efficient government of the rebel States,' passed March two, eighteen hundred and sixty-seven, and to facilitate restoration," passed March twenty-three, eighteen hundred and sixty-seven, shall have power, and it shall be their duty before allowing the registration of any person, to ascertain, upon such facts or information as they can obtain, whether such person is entitled to be registered under said act, and the oath required by said act shall not be conclusive on such question, and no person shall be registered unless such board shall decide that he is entitled thereto; and such board shall also have power to examine, under oath (to be administered by any member of such board), any one touching the qualification of any person claiming registration; but in every case of refusal by the board to register an applicant, and in every case of striking his name from the list as hereinafter provided, the board shall make a note or memorandum, which shall be returned with the registration list to the commanding general of the district, setting forth the grounds of such refusal or such striking from the list: *Provided*, That no person shall be disqualified as member of any board of registration by reason of race or color.

SEC. 6. *And be it further enacted*, That the true intent and meaning of the oath prescribed in said supplementary act is (among other things), that no person who has been a member of the legislature of any State, or who has held any executive or judicial office in any State, whether he has taken an oath to support the Constitution of the United States or not, and whether he was holding such office at the commencement of the rebellion, or had held it before, and who has afterwards engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof, is entitled to be registered or to vote; and the words "executive or judicial office in any State" in said oath mentioned shall be construed to include all civil offices created by law for the administration of any general law of a State, or for the administration of justice.

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SEC. 7. *And be it further enacted*, That the time for completing the original registration provided for in said act may, in the discretion of the commander of any district, be extended to the first day of October, eighteen hundred and sixty-seven; and the boards of registration shall have power, and it shall be their duty, commencing fourteen days prior to any election under said act, and upon reasonable public notice of the time and place thereof, to revise, for a period of five days, the registration lists, and upon being satisfied that any person not entitled thereto has been registered, to strike the name of such person from the list, and such person shall not be allowed to vote. And such board shall also, during the same period, add to such registry the names of all persons who at that time possess the qualifications required by said act who have not been already registered; and no person shall, at any time, be entitled to be registered or to vote by reason of any executive pardon or amnesty for any act or thing which, without such pardon or amnesty, would disqualify him from registration or voting.

SEC. 8. *And be it further euacted*, That section four of said last-named act shall be construed to authorize the commanding general named therein, whenever he shall deem it needful, to remove any member of a board of registration and to appoint another in his stead, and to fill any vacancy in such board.

SEC. 9. *And be it further enacted*, That all members of said boards of registration and all persons hereafter elected or appointed to office in said military districts, under any so-called State or municipal authority, or by detail or appointment of the district commanders, shall be required to take and to subscribe the oath of office prescribed by law for officers of the United States.

SEC. 10. *And be it further enacted*, That no district commander or member of the board of registration, or any of the officers or appointees acting under them, shall be bound in his action by any opinion of any civil officer of the United States.

SEC. 11. *And be it further enacted*, That all the provisions of this act and of the acts to which this is supplementary shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
B. F. WADE,
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U. S., July 19, 1867.

The President of the United States having returned to the House of Representatives, in which it originated, the bill entitled "An Act supplementary to an act entitled 'An Act to provide for the more efficient government of the rebel States,' passed on the second day of March, eighteen hundred and sixty-seven, and the act supplementary thereto passed on the twenty-third day of March, eighteen hundred and sixty-seven," with his objections thereto, the House of Representatives proceeded, in pursuance of the Constitution, to reconsider the same; and

Resolved, That the bill do pass, two thirds of the House of Representatives agreeing to pass the same.

Attest:

EDWD. MCPHERSON,
Clerk H. R. U. S.

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IN THE SENATE OF THE UNITED STATES,
July 19, 1867.

The Senate having proceeded, in pursuance of the Constitution, to reconsider the bill entitled "An Act supplementary to an act entitled 'An Act to provide for the more efficient government of the rebel States,' passed on the second day of March, eighteen hundred and sixty-seven, and the act supplementary thereto, passed on the twenty-third day of March, eighteen hundred and sixty-seven," returned to the House of Representatives by the President of the United States, with his objections, and sent by the House of Representatives to the Senate, with the message of the President returning the bill:

Resolved, That the bill do pass, two thirds of the Senate agreeing to pass the same.

Attest: J. W. FORNEY,
Secretary.
By W. J. McDONALD,
Chief Clerk.

The history of the three classes of military or provisional governments which have been erected over the rebel districts is well known. The *first* were created by President Lincoln as commander-in-chief, *flagrante bello*, as a means of conducting hostilities against the enemy, and of holding conquered districts by his military forces. The *second* were created by President Johnson, under a plan or policy adopted by him, as an organism for reconstruction, or restoration of the rebels to the Union. The *third* were military governments instituted by laws of Congress, under its war powers, for the purpose of more effectual control of our enemies, and of facilitating and prescribing the conditions of their return to the Union. The circumstances which led to the passage of these acts may be most conveniently stated in language used upon another occasion.*

"While the war was going on, and as our armies recovered possession of the hostile country, President Lincoln, as commander-in-chief, by virtue of his war powers, erected provisional or temporary military governments over it, to establish law and order, and to protect the rights of loyal or peaceable citizens who were found therein.

"Andrew Johnson, when chosen Vice-President, was acting as military governor of Tennessee, and was in the exercise of all the powers which were bestowed upon any military governor in the rebel States, and, as I have occasion to know, was fully satisfied that he was acting in strict accordance with the Constitution. Very soon after he became President, he undertook to lay down or resign his war powers as commander-in-chief, to terminate all the military governments which had been erected by President Lincoln, and, in place of these, to construct local State governments, according to a scheme of his own. This he assumed to do by virtue of a clause in the Constitution which reads thus: 'The United States shall guarantee to every State in this Union a republican form of government.' He undertook to execute that guarantee by withdrawing military governments from all the States; by proclamations of peace, by pardons and amnesties, and by causing or allowing such of the inhabitants of rebel districts as he saw fit to select to

* See Address by the author, printed August 15, 1868.

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form local governments over the several States, prescribing what laws they should pass, what Constitutions they should form, what amendments of our Constitution they should ratify; asserting that these States had never been out of the Union (or, in other words, had never lost any rights by the rebellion), and were as fully entitled under the Constitution to send senators and representatives to Congress, as though they had never become public enemies. Although the President, as commander-in-chief of the army in time of civil war, lawfully recognized as such, may erect and maintain over the public enemies of the United States military governments, and may administer those governments according to his will and pleasure, subject to the laws of Congress 'concerning captures on land and water,' and 'for the government and regulation of the land and naval forces,' yet, if in fact the President lays down his war power, as commander-in-chief, by declaring that war no longer exists, and if he claims, by virtue of his office as chief executive, to act as governor of one or of eleven States in this Union, or if he claims the right to elect or to appoint governors over States, or to give authority to any man or to any number of men, in any district of this country, to elect governors or other officers, or to organize governments in any place, I am unable to find in the Constitution of the United States any provision or any suggestion which authorizes or sustains such claims.

"When President Johnson first entered upon the plan of erecting State governments, the Secretary of State announced that, as they had been initiated during the recess of Congress, they would be provisional only, and that this plan of reconstruction would be submitted to Congress at its next session for approval or rejection. This pledge the President refused to perform; and instead of consulting he resisted Congress. He conferred on governors of his own appointment a greater power than he had ever intrusted to generals in command of military districts; for, in his proclamation in 1865, in reference to North Carolina, he subjected the military power to the command of his civil governor. He orders, —

"'That the military commander of the department, and all officers and persons in the military and naval service, aid and assist the said provisional governor in carrying into effect this proclamation.'

"In the summer of 1865, and during the whole of the year 1866, Mr. Johnson prosecuted his efforts to carry out his policy, and the result was, that every southern State fell into the hands of disloyal enemies of the Union; disorder and violence prevailed; northerners, supporters of the government, were murdered, robbed, exiled, unless under military protection; stay laws, laws for bringing back slavery in fact, laws authorizing cruel punishments, laws disfranchising the colored population, were passed, and every conceivable wrong and oppression were inflicted upon those who had served in the Union armies; murderers of Union men went openly unpunished, and every crime of which a society utterly disorganized was capable was practised with impunity. In such a condition of affairs, with leading rebels pardoned and promoted, the punishment of treason stopped and confiscation ended, such encouragement was given by the President to the rebels that they claimed to have as good a right as citizens of the loyal States to come up to Washington and assume the reins of government. Under the lead of President Johnson's governors, they went on to form State governments with rebel and disloyal officers, and to elect senators and representatives who had the impudence to knock for admission at the doors of Congress. Some of these would-be members were red-handed traitors, who, by reason of their crimes, were ineligible to office by the laws of the country. Yet the President insisted on urging them in, and reiterated *ad nauseam* his opinion that it was the duty of Congress to recognize these

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sham governments, created by his dictation, in violation of the law, the Constitution, and the expressed will of the people. Congress was thus compelled either to allow the control of the rebel States to pass back into the hands of the rebels themselves, and to accept as senators and representatives the ringleaders of the rebellion, and thus to perpetuate disunion, or to take speedy and decisive measures to overthrow these governments. Having hesitated long in coming to an open rupture with President Johnson, having resorted to persuasion, entreaty, and remonstrance in vain, Congress was reluctantly constrained to use its power and perform its duty in preventing the President from any further violation of the Constitution by continuing his illegal governments in the Southern States. Therefore, on the 2d of March, 1867, after thorough debate, was passed an 'Act to provide for the more efficient government of the rebel States.' This was followed, on the 22d of March, by a supplementary 'Act to facilitate restoration.' And to these a recent amendment has been added.

"These statutes, passed by overwhelming majorities over the President's vetoes, are called the Reconstruction Acts. They declared the rebel States still subject to the '*military authority*' of the United States, divided them into military districts, required the President to assign army officers to the command of each district, and to detail sufficient military force to enable them to enforce their authority. They made it the duty of such *officers* 'to protect all persons in their rights of person and property,' 'to suppress insurrection, disorder, and violence; to punish criminals either by aid of *civil tribunals or by military commissions*.' They declared that 'all interference under color of State authority with the exercise of military authority under this Act (March 2) shall be null and void.'

"These acts also provided for the formation of constitutions by delegates to conventions of male citizens of lawful age, 'without distinction of race, color, or previous condition,' who had been residents in such States one year prior to the election, excepting only felons and those who might be disfranchised as rebels. If these constitutions thus to be formed should be so framed as to conform to the Constitution of the United States, and if they should provide that the elective franchise should be enjoyed by all male citizens of these States, twenty-one years of age, who had resided in such States one year before election, except felons and disfranchised rebels, and if such constitutions should be ratified by a majority of persons voting on the question of ratification who are qualified as electors of delegates, and if such constitutions should be approved by Congress, and if the respective State legislatures should ratify the Fourteenth Amendment of the Constitution of the United States, then, when such Article XIV. should become a part of the Constitution of the United States, each State, on complying with these conditions, shall be entitled to representation in Congress. It was also provided that rebels excluded from holding office by the Fourteenth Amendment should not vote for or be members of the constitutional conventions.

"The act of March 2d asserted *supreme military authority* over the rebel States until their re-admission to representation in Congress, declared all these civil governments then existing as provisional only, and subject to the right of Congress to remove or overthrow them, and designated who should and who should not have the right to vote or be eligible to office. Subsequent acts provided for registration of voters, and somewhat modified the requirement as to the number of voters by whom constitutions might be adopted. The inhabitants of the rebellious districts, under the provisions of these Reconstruction Acts, have formed State constitutions, have organized new State governments, and, with the exception of three States, have conformed to all the requirements of law, and are now re-admitted to representation in Congress and to full standing with the other loyal States.

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There is little reason to doubt that in a short time all the States will be restored; and no other questions can be raised in relation to these Reconstruction Acts than these: 1st, whether Congress had authority under the Constitution to prescribe terms and conditions precedent to the restoration of the rebel States to representation; and, 2d, whether the terms and conditions of such re-admission are binding upon the States when once admitted?* These questions, which involve the old controversy about State rights, if not speedily and conclusively settled, will be very likely to lead to another rebellion or civil war."

In the winter following the publication from which the foregoing extract was made, the most important of the questions above indicated was brought before the Supreme Court of the United States in the case of the *State of Georgia* v. *Stanton*, and it was unanimously decided (December Term, 1868–9), "That the distinction between the judicial and political power is so generally acknowledged in the jurisprudence both of England and this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction." "That this Court has *no jurisdiction* over questions of *political rights, rights of State sovereignty, of political jurisdiction, of government*, of the question of *corporate existence as a State;*" and inasmuch as the complainants sought in this case to enforce or protect their alleged political rights, the judges refused to issue an injunction against Mr. Stanton (who, as Secretary of War, *pro hæc vice*, represented the Executive) to prevent him from causing these reconstruction laws to be enforced, and thereby destroying the so-called State government of Georgia. (See *State of Georgia* v. *Stanton*, 6 *Wallace*, 63.)

On the 24th of July, 1866, by joint resolution, No. 73, Congress declared Tennessee restored to the Union, that State having complied with the requisitions of previous legislation, and also declared that such restoration could be made only by the consent of the law-making power of the United States.

On the 22d of June, 1868, an act (see Stat. 1868, Chap. 69) was passed to admit the State of Arkansas to representation in Congress, upon a fundamental condition therein stated; and this was followed on the 25th of June, 1868, by another act (Chap. 70) for admitting to representation in Congress the States of North and South Carolina, Louisiana, Georgia, Alabama, and Florida, upon the terms and conditions therein set forth.

On the 10th of April, 1869, an act was approved, "authorizing the submission of the constitutions of Virginia, Mississippi, and Texas to a vote of the people, and authorizing the election of State officers, provided by said constitutions, and members of Congress." (Chap. 17.)

This act provides that the President may submit the constitution of Virginia to a vote of the people of that State, with a separate vote for its different provisions; that State officers and members of Congress may be voted for at the same election; that lists of voters shall be prepared and corrected, and elections held as provided by laws of Congress. Similar pro-

* West Virginia was admitted as a State into the Union, on *condition* of changing her constitution. (See Act December 31, 1862. Proclamation, April 20, 1863.) All the subsequent acts for admission of rebel States contain conditions prescribed by Congress.

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visions are made for Mississippi and for Texas; but no election is to be held in the latter State until directed by the President. If the constitution of either State shall be ratified therein, the legislatures thereof are to meet at the time and place prescribed. But before either State shall be admitted to representation in Congress, it shall ratify the Fifteenth Amendment of the Constitution. And it is further provided, that the proceedings in neither of these States shall be deemed final, and operate as a complete restoration thereof until approved by Congress. That approval having been given, these States have been restored to the Union.

Military Courts.

Most if not all of the acts of military courts of the United States, regularly constituted during the rebellion, have been confirmed by the laws of Congress; and jurisdiction over them has been denied to civil or judicial courts by the statute of March 2, 1867. (Chap. 155, Stat. p. 432.)

Chap. CLV. — *An Act to declare valid and conclusive certain Proclamations of the President, and Acts done in Pursuance thereof, or of his Orders, in the Suppression of the late Rebellion against the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all acts, proclamations, and orders of the President of the United States, or acts done by his authority or approval after the fourth of March, anno Domini eighteen hundred and sixty-one, and before the first day of July, anno Domini eighteen hundred and sixty-six, respecting martial law, military trials by courts martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts martial or military commissions, or arrests and imprisonments made in the premises by any person by the authority of the orders or proclamations of the President, made as aforesaid, or in aid thereof, are hereby approved in all respects, legalized and made valid, to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings, and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted and expressly authorizing and directing the same to be done. And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid, nor shall any person be held to answer in any of said courts for any act done or omitted to be done in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President within the period aforesaid, and respecting any of the matters aforesaid; and all officers and other persons in the service of the United States, or who acted in aid thereof, acting in the premises, shall be held prima facie to have been authorized by the President; and all acts and parts of acts heretofore passed, inconsistent with the provisions of this act, are hereby repealed.

Approved March 2, 1867.

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Such have been the principal measures of the government, from the beginning of the war down to the present time, relating to the questions of military or provisional government and reconstruction, or restoration of rebel States to their normal relations to the Union. They have fully embodied and practically and successfully applied the war powers claimed in this essay. Peace has been restored, slavery has been destroyed, liberty has been established on firm foundations; the authority of the Constitution and laws is now acknowledged in every part of the country. It is possible, even now, to estimate, in the light of our recent history, the weight of those objections against the war powers, which, in the early years of our conflict, were urged with much plausibility and force. No military dictator has seized the reins of power, or destroyed republican government. The rights to life, liberty, and property have not grown obsolete; but in more than one half of our country, the day has but just dawned when these rights have been, for the first time, secured to four millions of slaves, now made freemen and citizens. Every movement throughout the war, in relation to the rights of the people, has resulted in a more perfect, practical development, application, and establishment of the principles of freedom announced by our ancestors in the Declaration of Independence, and in the Constitution. The loyal people of the United States have ratified the use of the amplest war powers by their government for the preservation of the life of the nation when assailed by rebellion, and of these powers none rest upon a firmer foundation than that which authorizes Congress to provide laws for the military government of subjugated enemies, and laws for the restoration of rebel States to the Union, on such terms and conditions as it shall deem expedient.

Military Courts of the Confederates.

The following statutes passed by the Congress of the Confederate States will give an idea of the construction put by them upon the Constitution, so far as it relates to the power of instituting military courts by the legislature: —

Chap. XXXVI. — *An Act to organize Military Courts to attend the Army of the Confederate States in the Field, and to define the Powers of said Courts.*

The Congress of the Confederate States of America do enact, That courts shall be organized, to be known as military courts, one to attend each army corps in the field, under the direction of the President. Each court shall consist of three members, two of whom shall constitute a quorum, and each member shall be entitled to the rank and pay of a colonel of cavalry, shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office during the war, unless the court shall be sooner abolished by Congress. For each court there shall be one Judge Advocate, to be appointed by the President, by and with the advice and consent of the Senate, with the rank and pay of a captain of cavalry, whose duties shall be as prescribed by the rules and articles of war, except as enlarged or modified by the purposes and provisions of this act, and who shall also hold his office during the war, unless the court shall be sooner abolished by the Congress; and in case of the absence or disability of the Judge Advocate,

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upon the application of the court, the commander of the army corps to which such court is attached may appoint or detail an officer to perform the duties of Judge Advocate during such absence or disability, or until the vacancy, if any, shall be filled by the President.

SEC. 2. Each court shall have the right to appoint a Provost Marshal, to attend its sittings, and execute the orders of the court, with the rank and pay of a captain of cavalry; and also a clerk, who shall have a salary of one hundred and twenty-five dollars per month, who shall keep the record of the proceedings of the court, and shall reduce to writing the substance of the evidence in each case, and file the same in court. The Provost Marshal and the clerk shall hold their offices during the pleasure of the court. Each member and officer of the court shall take an oath well and truly to discharge the duties of his office to the best of his skill and ability, without fear, favor, or reward, and to support the Constitution of the Confederate States. Each member of the court, the Judge Advocate, and the clerk shall have the power to administer oaths.

SEC. 3. Each court shall have power to adopt rules for conducting business, and for the trial of causes, and to enforce the rules adopted, and to punish for contempt, and to regulate the taking of evidence, and to secure the attendance of witnesses, and to enforce and execute its orders, sentences, and judgments, as in cases of courts martial.

SEC. 4. The jurisdiction of each court shall extend to all offences now cognizable by courts martial under the rules and articles of war and the customs of war, and also to all offences defined as crimes by the laws of the Confederate States, or of the several States, and when beyond the territory of the Confederate States, to all cases of murder, manslaughter, arson, rape, robbery, and larceny, as defined by the common law, when committed by any private or officer in the army of the Confederate States, against any other private or officer in the army, or against the property or person of any citizen or other person not in the army: *Provided*, Said courts shall not have jurisdiction of offenders above the grade of colonel. For offences cognizable by courts martial, the court shall, on conviction, inflict the penalty prescribed by the rules and articles of war, and in the manner and mode therein mentioned; and for offences not punishable by the rules and articles of war, but punishable by the laws of the Confederate States, said court shall inflict the penalties prescribed by the laws of the Confederate States; and for offences against which penalties are not prescribed by the rules and articles of war, nor by the laws of the Confederate States, but for which penalties are prescribed by the laws of a State, said court shall inflict the punishment prescribed by the laws of the State in which the offence was committed: *Provided*, That in cases in which, by the laws of the Confederate States, or of the State, the punishment is by fine or by imprisonment, or by both, the court may, in its discretion, inflict any other punishment less than death; and for the offences defined as murder, manslaughter, arson, rape, robbery, and larceny, by the common law, when committed beyond the territorial limits of the Confederate States, the punishment shall be in the discretion of the court. That when an officer under the grade of brigadier general or private shall be put under arrest for any offence cognizable by the court herein provided for, notice of his arrest and of the offence with which he shall be charged shall be given to the Judge Advocate by the officer ordering said arrest, and he shall be entitled to as speedy a trial as the business before said court will allow.

SEC. 5. Said courts shall attend the army, shall have appropriate quarters within the lines of the army, shall be always open for the transaction of business, and the final decisions and sentences of said courts on convictions shall

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be subject to review, mitigation, and suspension, as now provided by the rules and articles of war in cases of courts martial.

SEC. 6. That during the recess of the Senate the President may appoint the members of the courts and the Judges Advocate provided for in the previous sections, subject to the confirmation of the Senate at its session next ensuing said appointments.

Approved October 9, 1862.

CHAP. XLIX. — *An Act to punish and represss the Importation, by our enemies, of Notes purporting to be Notes of the Treasury of the Confederate States.*

Whereas, Manifestly with the knowledge and connivance of the Federal Government, and for the purpose of destroying the credit and circulation of the treasury notes of this government, immense amounts of spurious or counterfeit notes, purporting to be such treasury notes, have been fabricated and advertised for sale in the enemy's country, and have been brought into these States, and put in circulation by persons in the service of the enemy:

The Congress of the Confederate States [*of America*] *do enact,* [That] every person in the service of, or adhering to, the enemy, who shall pass, or offer to pass, any such spurious or counterfeit note or notes, as aforesaid, or shall sell or attempt to sell the same, or shall bring any such note or notes into the Confederate States, or shall have any such note or notes in his possession, with intent to pass or sell the same, shall, if captured, be put to death by hanging; and every commissioned officer of the enemy who shall permit any offence mentioned in this section to be committed by any person under his authority, shall be put to death by hanging. Every person charged with an offence punishable under this act shall be tried by a military court in such manner, and under such regulations, as the President shall prescribe; and, after conviction, the President may commute the punishment to imprisonment in such manner, and for such time, as he may deem proper, and may pardon the offender on such conditions as he may deem proper, or unconditionally.

Approved October 13, 1862.

CHAP. LXXVII. — *An Act to amend an Act entitled "An Act to organize Military Courts to attend the Army of the Confederate States in the Field, and to define the Powers of said Courts," approved October* 9, 1862.

The Congress of the Confederate States of America do enact, That in addition to one military court to attend each army corps in the field, as now authorized by an act entitled "An Act to organize military courts to attend the army of the Confederate States in the field, and to define the power of said courts," approved October ninth, eighteen hundred and sixty-two, one military court shall be organized in each of such military departments as, in the judgment of the President, the public exigencies may require; to be organized in the manner and with powers prescribed in the act of which this is amendatory.

Approved May 1, 1863.

Joint Resolution on the subject of Retaliation.

Resolved by the Congress of the Confederate States of America, In response to the message of the President, transmitted to Congress at the commencement of the present session, that, in the opinion of Congress, the

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commissioned officers of the enemy ought not to be delivered to the authorities of the respective States, as suggested in the said message, but all captives taken by the Confederate forces ought to be dealt with and disposed of by the Confederate Government.

SEC. 2. That, in the judgment of Congress, the proclamations of the President of the United States dated respectively September twenty-second, eighteen hundred and sixty-two, and January first, eighteen hundred and sixty-three, and the other measures of the Government of the United States and of its authorities, commanders, and forces, designed or tending to emancipate slaves in the Confederate States, or to abduct such slaves, or to incite them to insurrection, or to employ negroes in war against the Confederate States, or to overthrow the institution of African slavery, and bring on a servile war in these States, would, if successful, produce atrocious consequences, and they are inconsistent with the spirit of those usages which in modern warfare prevail among civilized nations; they may, therefore, be properly and lawfully repressed by retaliation.

SEC. 3. That in every case, wherein, during the present war, any violation of the laws or usages of war among civilized nations shall be, or has been, done and perpetrated by those acting under the authority of the Government of the United States, on the persons or property of citizens of the Confederate States, or of those under the protection or in the land or naval service of the Confederate States, or of any State of the Confederacy, the President of the Confederate States is hereby authorized to cause full and ample retaliation to be made for every such violation, in such manner and to such extent as he may think proper.

SEC. 4. That every white person, being a commissioned officer, or acting as such, who, during the present war, shall command negroes or mulattoes in arms against the Confederate States, or who shall arm, train, organize, or prepare negroes or mulattoes for military service against the Confederate States, or who shall voluntarily aid negroes or mulattoes in any military enterprise, attack, or conflict in such service, shall be deemed as inciting servile insurrection, and shall, if captured, be put to death, or be otherwise punished at the discretion of the court.

SEC. 5. Every person, being a commissioned officer, or acting as such in the service of the enemy, who shall, during the present war, excite, attempt to excite, or cause to be excited, a servile insurrection, or who shall incite, or cause to be incited, a slave to rebel, shall, if captured, be put to death, or be otherwise punished at the discretion of the court.

SEC. 6. Every person charged with an offence punishable under the preceding resolutions shall, during the present war, be tried before the military court attached to the army or corps by the troops of which he shall have been captured, or by such other military court as the President may direct, and in such manner and under such regulations as the President shall prescribe, and, after conviction, the President may commute the punishment in such manner and on such terms as he may deem proper.

SEC. 7. All negroes and mulattoes who shall be engaged in war, or be taken in arms against the Confederate States, or shall give aid or comfort to the enemies of the Confederate States, shall, when captured in the Confederate States, be delivered to the authorities of the State or States in which they shall be captured, to be dealt with according to the present or future laws of such State or States.

Approved May 1, 1863.

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CHAP. XXXIII. — *An Act to amend an Act entitled "An Act to organize Military Courts to attend the Army of the Confederate States in the Field, and to define the Powers of said Courts.*

The Congress of the Confederate States of America do enact, That the act entitled "An Act to organize military courts to attend the army of the Confederate States in the field, and to define the power of said courts," be so amended as to authorize the President to establish one in North Alabama, which shall sit at such times and places as said court may direct, and shall have all the powers and jurisdiction given to said military courts by said act; but the judges thereof shall give ten days' notice of the times and places of holding said courts before the same are held: *Provided, however,* That said court shall cease to exist after one year from the passage of this act, unless longer continued by Congress.

Approved February 13, 1864.

[No. 7. See pp. 48, 54, 59.]

THE RIGHT OF CAPTURE OF ENEMY'S PROPERTY *JURE BELLI.*

In this essay, which was published after the passage of the law of Congress, approved July 13, 1861 (Chap. 3), commonly called the "Non-intercourse Act," and after the issue of the President's proclamation of August 16, 1861, which designated the territorial limits of the rebellion, the author claimed "that the United States, at that time, possessed full belligerent rights against the rebels; that all persons who had been, and voluntarily and permanently continued to be, domiciled within the district of country which had been declared in rebellion by the President's proclamation, were, in law, to be deemed *public enemies;* that all their property was to be deemed enemy's property, and was therefore liable to *capture jure belli,* or to seizure and confiscation, whether the owners thereof were loyal and friendly to the government, or otherwise; and that such capture, seizure, and confiscation could be made under the war powers, without violating the Constitution or the laws of nations."

It is interesting to observe the cautious steps by which the courts advanced towards a recognition of these principles of international law. In the case of the *United States* v. *The Tropic Wind,* decided June 13, 1861, by Dunlop, J., he maintained the right of the President, as commander of the navy in time of actual hostilities, to *blockade* the port of Richmond, and condemned an English schooner and her cargo for violating that blockade. In April, 1862, in the cases of the *Amy Warwick* (*Edmonds et al. claimants*), Judge Sprague, following the lead of Judge Dunlop and others in the prize cases of the *Tropic Wind,* the *General Parkhill,* the *Crenshaw,* the *North Carolina,* the *Pioneer,* and the *Hattie Jackson,* decided that property captured at sea by the naval forces of the United States on the 10th of August, 1861, owned by persons domiciled in Rich-

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mond, a city over which the rebels had at that time absolute dominion, there *being no evidence to explain or rebut the presumption of the personal hostility of such owners*, which arose from their continued residence therein, was lawful prize. (See Sprague's Reports, 124.) But having no occasion to pass upon the question whether the vessel or cargo would have been lawful prize, *if the owners had been loyal or friendly to the Union*, notwithstanding their residence at Richmond, the judge expressly declines to decide that point. "In questions so novel, I do not think fit," says he, "to go farther than the case before me requires."

In the second prize case of the *Amy Warwick* (p. 143,) *Dunlop, Moncure & Co. claimants*, he places his decision more fully on the ground that *residence* in the city of Richmond, under the circumstances, was good cause for condemnation of the captured property. "These claimants," says he, "*do not even offer proof of their loyalty*, and there is a high probability that they are willingly co-operating with the enemy. But if this be not so, they were at the time of their capture, and have ever since continued to be, under his absolute control, and that control is an inexorable military despotism. Every dollar put into their hands, or under their control, *is, to all practical purposes, in the hands of the enemy, and adds to his strength.*" The judge thus condemned as prize, property on the high seas belonging to persons who were *actually hostile*, or were *presumed* to be hostile, or were under the actual control of the rebels, and were so situated that the proceeds, if restored to the claimants, would, without doubt, have fallen into the hands of the enemy.

These cases, however, decided only questions of prize, and related only to captures on the sea. Judge Sprague expressed no opinion on the question as to the *political status* of the inhabitants of the rebel States. But neither his decision, nor those of the judges who had preceded him, were acquiesced in by the claimants; but all these prize cases were carried by appeal to the Supreme Court at Washington, and were finally decided at the December term, 1863–4. (See 2 Black's R.)

In relation to captures on land, no litigation had, at that early period of the war, been brought before the courts of the United States. No judicial decision could then be found, which claimed for the government the right, *jure belli*, to capture the property on land of ALL persons domiciled in the rebel territory. The existence of that right was almost universally questioned or denied. It was said that those only were liable to be treated as enemies, and to have their property seized or captured, who were enemies in fact, or who had engaged in open hostilities against the United States. It was denied that persons residing in the Confederate States, who were friendly to the Union, and had been guilty of no crime, could be transformed, in the eye of the law, into criminals by the acts of others, or could be made to suffer penalties for crimes which they had not committed. The rights and immunities guaranteed to citizens of the United States by the

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Constitution were claimed by and for them; and they asserted that the failure of the government to secure and protect them in the enjoyment of those rights was a breach of its constitutional duty, which not only absolved them from any and all injurious consequences which might result from the rebellion, but even entitled them to indemnity therefor. The question was asked by judges, by statesmen, and by well-informed citizens, what justification could be found for treating innocent and loyal residents in the seceded States, like rebel soldiers in the southern armies, as public enemies; for subjecting their persons and property to seizure and capture; for depriving them of civil and political rights? How could such injuries and indignities be inflicted on peaceable citizens, they asked, without violating, in every clause, that Constitution for the maintenance whereof our civil war was professedly carried on? In answer to such questions, it was necessary, at that time, to present such arguments as were set forth in the pages on the "War Powers," and to vindicate a right of our government, now no longer questioned, to capture and confiscate the property of all residents in rebel districts.

It seems strange, at this day (1870), to find how slow Congress was to recognize and put forth its powers against rebellion, and how tardily it asserted the right of war to *capture* enemy's property on land. August 6, 1861, an act was passed (Chap. 60), to confiscate such property of rebels as had been or was intended to be used by its owners in aid of insurrection; but it provided for the seizure of property only as a punishment for actual or intended crimes of individuals. It was in reality, if not in form, a prize act, and did not authorize the acquisition of enemy property by capture; for it did not assert the authority of the United States to capture the property, by the right of war, of persons other than active participants in rebellion. This statute was followed by that of July 17, 1862, Chap. 195, of which the chief provisions are explained in Chap. 6 (pp. 112–116), which was added to this essay when the law went into operation, as stated in the preface to the second edition. In this act Congress fell far short of carrying into effect the full extent of power, which, as the author believed, rightfully belonged to the government. It authorized the seizure of property of persons in the rebel States who were actually engaged in prosecuting war, and the condemnation of the same by judicial courts. The reader will find (on pages 126 to 130) the reasons then stated for believing that this law would prove practically inoperative. The history of the last six years has shown how far the anticipations of the author have been fulfilled. Congress was far from recognizing or sanctioning the right of the army to capture the property of rebels, in the rebel States, under the general laws of war, and left the question still open, whether our military forces could, without violating the laws and Constitution, capture the property of persons domiciled in the rebel States, unless they were engaged in hostilities, or unless the property seized was intended to be used in aid of rebellion.

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By the act of March 12, 1863 (Chap. 120), it was provided that the Secretary of the Treasury might appoint agents "to receive and collect all *abandoned or captured property*" in the insurrectionary States, "excepting such as had been used, or was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war" (these exceptions being embraced within the provisions of the former statute), and allowed such abandoned or captured property to be appropriated to public use; but treasury agents were required to receive the same, to keep records thereof, and to make returns of the proceeds to the treasury, so that the lawful owner might be able to recover the proceeds, if he should be rightfully entitled thereto. Even in this act Congress did not declare or sanction the belligerent right of capture, *jure belli*, of enemy's property, and the absolute transfer of title to enemy's property by capture alone, but undertook to provide a temporary stewardship for the care of such property, leaving the claims of owners for the proceeds, less expenses, to be prosecuted in the Court of Claims, at any time within two years after the war should be terminated, on proof of ownership, and of never having aided the rebellion.

It will be observed that the acts of Congress of July 13, 1861, August 16, 1861, and March 3, 1863, relate to confiscation for intra-territorial offences, and have no application to a libel suit against a prize captured at sea. (See the *Sally Magee*, 1863, Blatchf. Pr. Cases, 382.) They *do not*, by implication, *exclude* seizure and confiscation under the general powers of the government, upon principles of public law, and the forfeiture may be enforced by the court, either under the statute, or, through its powers, under process, in prize. (As to the first of these acts, see the *Sarah Starr*, 1861, Blatchf. Pr. Cases.)

The power of "making rules concerning captures on land and water," which is superadded in the Constitution to that of declaring war, is not confined to captures which are extra-territorial, but extends to rules respecting enemy's property found within the territory, and is an express grant to Congress of the power of confiscating enemy's property found within the territory at the declaration of war, as an independent substantive power, not included in that of declaring war. (See *Brown* v. *United States*, 1814. 8 Cranch, 110.) By virtue of this power, articles of war were enacted by the act of 10th April, 1806, of which Art. LVIII. provided that "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, ammunition, clothing, forage, or provisions, shall be sècured for the service of the United States; for the neglect of which the commanding officer is to be amenable." But it is remarkable that, during the civil war, no law should have been passed, which, in *direct* terms, asserts the rights of the United States to capture, *jure belli*, the property of all who have been declared public enemies of the country, domiciled in the rebellious district. Of the existence of that right probably few, if any, now entertain a doubt. It has

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been exercised in many cases, and since the publication of the earlier editions of the "War Powers," this right of capture, in its amplest extent, has been directly, or by necessary implication, recognized and sanctioned by the political departments of the government, and by solemn and repeated adjudications of the courts of the United States.

In addition to the authorities cited in the 10th (Boston) edition, the reader is referred to several more recent decisions in the Circuit and Supreme Courts.

See *Mrs. Alexander's Cotton*, 2 Wallace, R. 417. (1864–5.) App. 532.

The Battle, 6 Wallace, 498.

Armstrong's Foundry, 6 Wallace, 769.

U. S. v. *Republican Banner Office*, 11 Pitt's Leg. Reg. 153.

Cooledge v. *Guthrie* (Opinion of Mr. Justice Swayne. Appendix, p. 591).

War Powers used by the Confederates.

Every clause in our Constitution which contains or limits the war powers of our government, was copied unaltered into the Constitution of the Confederate States. The interpretation of these powers by the Confederates is embodied in the several acts of their Provisional Congress, and in their Statutes at Large. The act of the Provisional Congress, Chap. 3, approved May 6, 1861, in which war was declared, was as follows: —

An Act recognizing the Existence of War between the United States and the Confederate States, and concerning Letters of Marque, Prizes and Prize Goods.

Whereas, the earnest efforts made by this Government to establish friendly relations between the Government of the United States and the Confederate States, and to settle all questions of disagreement between the two Governments upon principles of right, justice, equity and good faith, have proved unavailing by reason of the refusal of the Government of the United States to hold any intercourse with the commissioners appointed by this Government for the purposes aforesaid, or to listen to any proposal they had to make for the peaceful solution of all causes of difficulty between the two Governments: *and whereas*, the President of the United States of America has issued his proclamation making requisition upon the States of the American Union for seventy-five thousand men for the purpose, as therein indicated, of capturing forts and other strongholds within the jurisdiction of, and belonging to, the Confederate States of America, and has detailed naval armaments upon the coasts of the Confederate States of America, and raised, organized and equipped a large military force to execute the purpose aforesaid, and has issued his other proclamation announcing his purpose to set on foot a blockade of the ports of the Confederate States: *and whereas*, the State of Virginia has seceded from the Federal Union, and entered into a convention of alliance offensive and defensive with the Confederate States, and has adopted the Provisional Constitution of the said States; and the States of Maryland, North Carolina, Tennessee, Kentucky, Arkansas and Missouri have refused, and it is believed that the State of Delaware and the inhabitants of the territories of Arizona and New Mexico, and the Indian territory south of Kansas, will refuse to co-operate with the Government of the United States in these acts of hostilities and wanton

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aggression, which are plainly intended to overawe, oppress and finally subjugate the people of the Confederate States: *and whereas*, by the acts and means aforesaid, war exists between the Confederate States and the Government of the United States, and the States and Territories thereof, except the States of Maryland, North Carolina, Tennessee, Kentucky, Arkansas, Missouri and Delaware, and the Territories of Arizona and New Mexico, and the Indian Territory south of Kansas: Therefore,

SEC. 1. *The Congress of the Confederate States of America do enact*, That the President of the Confederate States is hereby authorized to use the whole land and naval force of the Confederate States to meet the war thus commenced, and to issue to private armed vessels commissions, or letters of marque and general reprisal, in such form as he shall think proper, under the seal of the Confederate States, against the vessels, goods and effects of the Government of the United States, or of the citizens or inhabitants of the States and Territories thereof, except the States and Territories hereinbefore named: *Provided, however*, That property of the enemy (unless it be contraband of war) laden on board a neutral vessel, shall not be subject to seizure under this act: *And provided further*, That vessels of the citizens or inhabitants of the United States now in the ports of the Confederate States, except such as have been since the fifth of April last, or may hereafter be, in the service of the Government of the United States, shall be allowed thirty days after the publication of this act to leave said ports and reach their destination; and such vessels and their cargoes, excepting articles contraband of war, shall not be subject to capture under this act during said period, unless they shall have previously reached the destination for which they were bound on leaving said ports.

SEC. 2. That the President of the Confederate States shall be, and he is hereby, authorized and empowered to revoke and annul, at pleasure, all letters of marque and reprisal which he may at any time grant pursuant to this act.

SEC. 3. That all persons applying for letters of marque and reprisal, pursuant to this act, shall state in writing the name and a suitable description of the tonnage and force of the vessel, and the name and place of residence of each owner concerned therein, and the intended number of the crew; which statement shall be signed by the person or persons making such application, and filed with the Secretary of State, or shall be delivered to any other officer or person who shall be employed to deliver out such commissions, to be by him transmitted to the Secretary of State.

SEC. 4. That before any commission or letters of marque and reprisal shall be issued as aforesaid, the owner or owners of the ship or vessel for which the same shall be requested, and the commander thereof for the time being, shall give bond to the Confederate States, with at least two responsible sureties not interested in such vessel, in the penal sum of five thousand dollars, or if such vessel be provided with more than one hundred and fifty men, then in the penal sum of ten thousand dollars, with condition that the owners, officers and crew who shall be employed on board such commissioned vessel, shall and will observe the laws of the Confederate States, and the instructions which shall be given them according to law for the regulation of their conduct, and will satisfy all damages and injuries which shall be done or committed contrary to the tenor thereof, by such vessel during her commission, and to deliver up the same when revoked by the President of the Confederate States.

SEC. 5. That all captures and prizes of vessels and property shall be forfeited and shall accrue to the owners, officers and crews of the vessels by whom such captures and prizes shall be made, and on due condemnation

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had, shall be distributed according to any written agreement which shall be made between them; and if there be no such written agreement, then one moiety to the owners and the other moiety to the officers and crew, as nearly as may be, according to the rules prescribed for the distribution of prize money by the laws of the Confederate States.

SEC. 6. That all vessels, goods and effects, the property of any citizen of the Confederate States, or of persons resident within and under the protection of the Confederate States, or of persons permanently within the territories and under the protection of any foreign prince, government or state in amity with the Confederate States, which shall have been captured by the United States, and which shall be recaptured by vessels commissioned as aforesaid, shall be restored to the lawful owners, upon payment by them of a just and reasonable salvage, to be determined by the mutual agreement of the parties concerned, or by the decree of any court having jurisdiction, according to the nature of each case, agreeably to the provisions established by law. And such salvage shall be distributed among the owners, officers and crews of the vessels commissioned as aforesaid, and making such captures, according to any written agreement which shall be made between them; and in case of no such agreement, then in the same manner and upon the principles herein before provided in cases of capture.

SEC. 7. That before breaking bulk of any vessel which shall be captured as aforesaid, or other disposal or conversion thereof, or of any articles which shall be found on board the same, such captured vessel, goods or effects shall be brought into some port of the Confederate States, or of a nation or state in amity with the Confederate States, and shall be proceeded against before a competent tribunal, and after condemnation and forfeiture thereof shall belong to the owners, officers and crew of the vessel capturing the same, and be distributed as before provided; and in the case of all captured vessels, goods and effects, which shall be brought within the jurisdiction of the Confederate States, the district courts of the Confederate States shall have exclusive original cognizance thereof, as in civil causes of admiralty and maritime jurisdiction; and the said courts, or the courts, being courts of the Confederate States, into which such cases shall be removed, and in which they shall be finally decided, shall and may decree restitution in whole or in part, when the capture shall have been made without just cause. And if made without probable cause, may order and decree damages and costs to the party injured, for which the owners and commanders of the vessels making such captures, and also the vessels, shall be liable.

SEC. 8. That all persons found on board any captured vessels, or on board any recaptured vessel, shall be reported to the collector of the port in the Confederate States in which they shall first arrive, and shall be delivered into the custody of the marshal of the district, or some court or military officer of the Confederate States, or of any State in or near such port, who shall take charge of their safe keeping and support, at the expense of the Confederate States.

SEC. 9. That the President of the Confederate States is hereby authorized to establish and order suitable instructions for the better governing and directing the conduct of the vessels so commissioned, their officers and crews, copies of which shall be delivered by the collector of the customs to the commanders, when they shall give bond as before provided.

SEC. 10. That a bounty shall be paid by the Confederate States of twenty dollars for each person on board any armed ship or vessel, belonging to the United States, at the commencement of an engagement, which shall be burnt, sunk or destroyed by any vessel commissioned as aforesaid, which shall be of equal or inferior force, the same to be divided as in other cases

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of prize money; and a bounty of twenty-five dollars shall be paid to the owners, officers and crews of the private armed vessels commissioned as aforesaid, for each and every prisoner by them captured and brought into port, and delivered to an agent authorized to receive them, in any port of the Confederate States; and the Secretary of the Treasury is hereby authorized to pay or cause to be paid to the owners, officers and crews of such private armed vessels commissioned as aforesaid, or their agent, the bounties herein provided.

SEC. 11. That the commanding officer of every vessel having a commission or letters of marque and reprisal, during the present hostilities between the Confederate States and the United States, shall keep a regular journal, containing a true and exact account of his daily proceedings and transactions with such vessel and the crew thereof; the ports and places he shall put into or cast anchor in; the time of his stay there and the cause thereof; the prizes he shall take and the nature and probable value thereof; the times and places when and where taken, and in what manner he shall dispose of the same; the ships or vessels he shall fall in with; the times and places when and where he shall meet with them, and his observations and remarks thereon; also, of whatever else shall occur to him or any of his officers or marine, or be discovered by examination or conference with any marines or passengers of or in any other ships or vessels, or by any other means touching the fleets, vessels and forces of the United States, their posts and places of station and destination, strength, numbers, intents and designs; and such commanding officer shall, immediately on his arrival in any port of the Confederate States from or during the continuance of any voyage or cruise, produce his commission for such vessel, and deliver up such journal so kept as aforesaid, signed with his proper name and handwriting, to the collector or other chief officer of the customs at or nearest to such port; the truth of which journal shall be verified by the oath of the commanding officer for the time being. And such collector or other chief officer of the customs shall, immediately on the arrival of such vessel, order the proper officer of the customs to go on board and take an account of the officers and men, the number and nature of the guns, and whatever else shall occur to him on examination material to be known; and no such vessel shall be permitted to sail out of port again until such journal shall have been delivered up, and a certificate obtained under the hand of such collector or other chief officer of the customs that she is manned and armed according to her commission; and upon delivery of such certificate, any former certificate of a like nature which shall have been obtained by the commander of such vessel, shall be delivered up.

SEC. 12. That the commanders of vessels having letters of marque and reprisal as aforesaid, neglecting to keep a journal as aforesaid, or wilfully making fraudulent entries therein, or obliterating the record of any material transactions contained therein, where the interest of the Confederate States is concerned, or refusing to produce and deliver such journal, commission or certificate, pursuant to the preceding section of this act, then and in such cases the commissions or letters of marque and reprisal of such vessel shall be liable to be revoked; and such commanders respectively shall forfeit for every such offence the sum of one thousand dollars, one moiety thereof to the use of the Confederate States, and the other to the informer.

SEC. 13. That the owners or commanders of vessels having letters of marque and reprisal as aforesaid, who shall violate any of the acts of Congress for the collection of the revenue of the Confederate States, and for the prevention of smuggling, shall forfeit the commission or letters of marque and reprisal, and they and the vessels owned or commanded by them shall

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be liable to all the penalties and forfeitures attaching to merchant vessels in like cases.

SEC. 14. That on all goods, wares and merchandise captured and made good and lawful prizes of war, by any private armed ship having commission or letters of marque and reprisal under this act, and brought into the Confederate States, there shall be allowed a deduction of thirty-three and one third per cent. on the amount of duties imposed by law.

SEC. 15. That five per centum on the net amount (after deducting all charges and expenditures) of the prize money arising from captured vessels and cargoes, and on the net amount of the salvage of vessels and cargoes recaptured by the private armed vessels of the Confederate States, shall be secured and paid over to the collector or other chief officer of the customs, at the port or place in the Confederate States at which such captured or recaptured vessels may arrive, or to the consul or other public agent of the Confederate States residing at the port or place not within the Confederate States at which such captured or recaptured vessel may arrive. And the moneys arising therefrom shall be held and are hereby pledged by the Government of the Confederate States as a fund for the support and maintenance of the widows and orphans of such persons as may be slain, and for the support and maintenance of such persons as may be wounded and disabled on board of the private armed vessels commissioned as aforesaid, in any engagement with the enemy, to be assigned and distributed in such manner as shall hereafter be provided by law.

Approved May 6, 1861.

This act made all citizens of the United States, with certain exceptions, alien public enemies of the Confederacy, and subjected their persons and property, of every description, real and personal, to the sternest rules of belligerent law. It authorized letters of marque, and provided for the adjudications of captured prizes. The acts of August 8, August 30, December 23, 1861, and February 15, 1862, will show the application of the laws of war to the persons and property of others not embraced in this act, and will give a striking exposition of the extreme severity with which belligerent law may be applied, without going beyond the Constitution as understood by rebels then, and by loyal citizens now. For these acts, see note to page 116, "On Confiscation."

[See page 48.]

DISTINCTION BETWEEN CAPTURE AND PRIZE.

The distinction between captures on land and prizes on the high seas, in respect to the mode and time of passing or changing the title of the property from the owner to the captor, as stated in the text (p. 48), has been recognized by the courts of the United States in several recent cases. In the former *the title passes* as soon as the capture is complete. In the latter the right of property remains unchanged until a *final decree* of condemnation by courts of the country of the captors. See *The Peterhoff*, Bl. Pr. Cas. 620. (1865.)

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[No. 8. See p. 275.]

MILITARY COMMISSIONS,

As regarded by the Supreme Court, and by Congress. The Case of Ex parte Milligan.

Congress passed an act, March 3, 1863 (12 Stat. 755), which provided that persons imprisoned under the authority of the President, *and not held as prisoners of war*, should, under the circumstances therein set forth, be entitled to be brought, by writ of *habeas corpus*, before certain courts of the United States, and to be discharged from *military* custody. Milligan claimed his release under the provisions of this act. None of the judges of the Supreme Court questioned its constitutionality, and all agreed that the petitioner's case came within its provisions, and that he was therefore entitled to his discharge. The order of the court was, "That, on the facts stated in the said petition and exhibits, the said Milligan ought to be discharged from custody as in said petition is prayed, according to the Act of Congress passed March 3, 1863, entitled "An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases."

In the elaborate opinions of the Chief Justice and of Mr. Justice Davis, a *further question* is discussed — "Whether it would *have been within* the power of Congress to authorize such a military commission to be held in Indiana," *under the circumstances set forth in the petition and exhibits?*

As Congress had passed no law authorizing that commission, and as no "case" had arisen involving any question as to the *validity of such a law*, it is clear that the Supreme Court had no power to decide this abstract question. It must therefore be deemed as still undecided. But the discussions and the reasons of the opposing judges are none the less interesting and instructive.

It was held by the court that a certain military commission, before which one Milligan was tried, in October, 1864, at Indianapolis, had no jurisdiction to try and sentence him, he not being a resident of one of the rebellious States, *nor a prisoner of war*, but a citizen of Indiana for twenty years past, and never in the military or naval service of the United States, *or of their enemies*; the majority of the court claiming to have "*judicial knowledge that in Indiana, in time of war, the Federal authority was always unopposed*, and its courts always open to hear criminal accusations, and redress grievances." On this statement of facts five of the judges were of opinion that Milligan had the right of trial by jury, and could not be lawfully tried by the military commission. The same judges also said that in case of foreign invasion, or civil war, "*if the courts are closed*," and if it is impossible to administer criminal justice according to law, *then, on the theatre of active military operations*, where *war really prevails*, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the

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safety of the army and of society; and as no power is left but military, *it is allowed to govern by martial rule*, until the laws can have their free course, but that martial law must be confined to the locality of actual war. "It may be a necessity in one State, when in another it would be lawless violence."

It will be observed that the majority of the court, in delivering their opinion, declare and assume, as the basis of their judgment, the existence of a state of facts, of which they claim to have had judicial knowledge; namely, that in Indiana, at the time and place where Milligan was arrested, in a period of civil war, "*the Federal authority was always unopposed.*"

The act of Congress approved March 3, 1863, authorized the President, when public safety required it, during the war, to suspend the writ of *habeas corpus* throughout the United States; and by proclamation of September 15, 1863, he had suspended the privilege of the writ in cases where, by his authority, military, naval, and civil officers of the United States held persons in their custody, either as *prisoners of war*, spies, or *aiders or abettors of the enemy*, or as belonging to the land or naval forces of the United States, or otherwise *amenable to military law*, or the rules and articles of war, or the rules and regulations prescribed for the military or naval services, by authority of the President, or for *resisting a draft*, or for any other offence against the military or naval service."

The record of the military commission showed that Milligan was guilty of joining and aiding, at different times, between October, 1863, and August, 1864, a secret society, known as the Order of American Knights or Sons of Liberty, *for the purpose of overthrowing the government* and duly constituted authorities of the United States; that he was guilty of holding *communication with the enemy* (in Indiana); that he conspired with others *to seize the munitions of war of the United States stored in the public arsenals, and to liberate prisoners of war* held by the military forces of the United States; that he *resisted the draft* during a *period of war and armed rebellion* against the authority of the United States, at or near Indianapolis, and other places specified, in Indiana; that *that State was within the military lines* of the army of the United States, *and was the theatre of military operations, and had been invaded, and was constantly threatened to be invaded, by the enemy.*

In this state of facts, *shown upon the record*, it is not easy to see how the court could have *judicial knowledge* "*that the Federal authority was always unopposed in Indiana;* that State having been *actually invaded* by the *public enemy*, and invasion being *then threatened*, and measures being then in progress among the inhabitants of Indiana to join in the rebellion, to overthrow the government, to seize its public property, to liberate its prisoners of war, and thus to create an army of rebels, who, with our prisoners of war, might co-operate with Milligan and his associates in acts of hostility against the United States, in the places where our armies were being recruited and organized, and within our military lines.

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The fact, whether the legal *status* of war, or of peace, was recognized by the political department of the government, was of vital importance to the question of jurisdiction of the military commission which tried Milligan. That certain courts of the United States were held in Indiana, according to law, might be judicially known to the Supreme Court at Washington; but whether, in time of civil war, the authority of the United States was "unopposed," or whether the state of our military operations in that district was such that the courts could be held only because they were protected by the presence of the army, as was the case in some localities, which had not been formally declared by the President in rebellion, and the question what was the *military status* of that district in which the petitioner was captured, involved the ascertainment *of facts* of a political character, and of which our Supreme Court has not hitherto felt authorized to take *judicial cognizance.*

What is "the theatre of active military operations," in which, as declared by the majority of the court, martial law must be allowed to govern? What, in time of civil war, which involves every citizen, is "the actual locality of war"? Who is to determine these questions, or to say whether "the Federal authority is unopposed," or whether, on the contrary, hostile military organizations are in existence, which, if not opposed by arms, or by arrest or capture of their leaders, will break out into open hostilities, when it may be too late to avert the mischief? When civil war has been recognized or declared by the proper departments of the government, who has a right to decide *where* rebellion and war exist, and what are and what are not "active hostilities"? What department has the right to decide, for the time being, the *legal status* or condition of the inhabitants of any portion of any State, when hostilities are, in fact, going on, or are threatened? Such questions, under our government, cannot be decided by the Judicial Department, either on affidavits or other evidence taken by judges, or by their orders, nor by their opinions upon supposed *judicial knowledge* of facts. These are *political* questions to be decided by the political department of the government, and the courts are bound to respect and to be governed by those decisions.

Whenever, in case of foreign invasion, or of civil war, any section of the country is so remote from all military or naval operations as to have remained undisturbed by the presence of our military or naval forces, or by the open or secret hostilities of the enemy; when martial law has not been declared, and when the privilege of the writ of *habeas corpus* has not been suspended by reason of public danger; when the courts are open and unobstructed in the discharge of their official duties, without being *dependent upon the military power* of the country for their protection, the government not having taken those measures which it is authorized to take in time of insurrection, invasion, or civil war, a state of war not having been declared or recognized by the political departments, — the Executive would have no right to institute military tribunals for the punishment of citizens not be-

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longing to the military or naval service, in such a section of the country, and in such a condition of affairs, nor to deprive citizens of any of the privileges ordinarily secured to them under the Constitution. Whenever and wherever a *state of peace* is recognized as existing by the political department of the government, the laws of peace prevail, and the rights secured to citizens in time of peace must be respected and maintained; but wherever and whenever, in the United States, a state of war is so recognized, there and then the rights and liabilities of war attach.

Among the questions which it would seem desirable to have raised in preparing the record, and to have presented on the part of the United States, for the judgment of the court in Milligan's case, are, 1. Whether, under all the circumstances of hostilities practised against the Union by the public enemy in Indiana, a *state of war* had in fact been recognized by the political departments as existing *at the time and place* when said Milligan was captured? 2. Whether he was captured and held as a prisoner of war? It does not appear that he was *alleged*, in the record, to have been captured as a *prisoner of war*, nor that the officer who held him claimed to hold him as a prisoner of war; and it does appear that Milligan sought his discharge under the act of March 3, 1863, which is by its own terms inapplicable to prisoners of war. These questions, though not overlooked by counsel, were not properly presented by the record for adjudication. On the contrary, the only question presented and really decided was, whether Milligan was entitled to his discharge under the provisions of the law of Congress of March 3, 1863? and the court, *taking it as conceded* that the petitioner *was not captured and held as a prisoner of war*, unanimously decided that he was entitled to his discharge by the provisions of that law; thus, by necessary implication, sustaining the validity of the statute, and of the war powers embodied in it. This case decides nothing in relation to military commissions in rebel States. Since the opinions of the judges were announced, Congress has passed a statute for the purpose of preventing future litigation which would be likely to arise from the decisions of military courts and commissions during the war, by extending to their proceedings a full sanction, and by depriving civil courts of all right of subsequent jurisdiction over the same. (See Act, March 2, 1867, Chap. 155; also *note* on "Military Government.") *

See *Ex parte M'Cardle*, 7 Wallace, 509.

Act, March 27, 1868, 15 Stat. at Large, 44.

Ex parte Yerger, 8 Wallace, 85.

* Since the above was in type, the Supreme Court have fully recognized the war power of the government to establish military courts in the rebel territory. See *The Grapeshot*, 9 Wallace, 131, App. 601.

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[No. 9. Extracts from the Records of the War Department.]

THE EMANCIPATION BUREAU.

Letter from Hon. Thomas D. Eliot, Chairman of the Committee on Emancipation.

HOUSE OF REPRESENTATIVES,
ROOMS OF COMMITTEE ON EMANCIPATION, Dec. 26, 1863.

HON. E. M. STANTON, *Secretary of War.*

DEAR SIR: The Committee on Emancipation have directed me to submit to you a bill creating a Bureau of Emancipation in your department. Will you be pleased to examine the bill, and make such suggestions concerning it as may seem right? The committee will be also glad if they may have the benefit of any legal suggestions or criticisms from the eminent law solicitor of your department, and I respectfully ask that the bill may be referred to him for that purpose.

I have the honor to be, very truly,
Your friend and servant,
THOMAS D. ELIOT, *Chairman.*

To the Committee on Emancipation, House of Representatives.

HON. THOMAS D. ELIOT, *Chairman:*

The letter of which the foregoing is a copy has been received by the Secretary of War, and by him referred to me.

In compliance with the request which your chairman has made, I have the honor to say, that I have examined the bill presented by him (H. R., No. 51) to establish a Bureau of Emancipation, aided by personal explanations, which he has done me the favor to make, and I would suggest that there be inserted in the first page, eleventh line, after the word *enacted*, the following: "concerning persons of African descent, and of persons who are or shall become free by virtue of any proclamation, law, or military order, issued, enacted, or promulgated during the present rebellion, by virtue of any act of emancipation which has been or shall be enacted by any State for the freedom of such persons held to service or labor within such State, or who shall now be or hereafter become otherwise entitled to their freedom; and such commissioner shall have authority, under the direction of the Secretary of War, to make all needful rules and regulations for the general superintendence, direction, and management of all such persons, to appoint a chief clerk," &c.

In the foregoing, the change proposed gives the commissioner positive authority to make "*rules and regulations*," instead of merely "referring to him for adjustment and *determination of all questions* which may arise concerning persons of African descent. This language *might* be narrowed by opponents down to a mere *arbitration* of *legal questions.*

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It might not be safe to confine the commissioner's authority to action under laws "concerning persons of African descent," as there will be trouble in *practical* application of the laws of genealogy when we get into courts, especially if they are inclined to restrict the powers and jurisdiction of the commissioner; it is therefore proposed to include not only persons of African descent, but "all who are or shall become free," &c. As the law is retrospective in one sense, and as, before it shall have been approved, persons and States, perhaps the United States government, may have taken further steps forward, it is suggested that all its provisions should embrace not only those who now are free, but those also who may hereafter become free. The phraseology of the above is in accordance with that idea.

On the fourth page, ninth line, it is proposed to insert the following amendment, viz.: after the words, "*and the said*," insert the following: "commissioner, and by his direction the said assistant commissioners shall have power to permit persons of African descent and persons who are or shall have become free as aforesaid under such rules and regulations as may be from time to time prescribed by said commissioner, and approved by the Secretary of War, to occupy, cultivate, and improve all lands lying within those districts now or heretofore in rebellion, which lands may have been or may hereafter be abandoned by their former owners, and all real estate to which the United States shall have acquired title, and which shall not have been previously appropriated by the government to other uses." With the foregoing amendments and additions, it seems to me that the bill will give ample power to accomplish the object desired, as I suppose, by the honorable committee.

I hope, however, that it will not be deemed an impropriety for me to make another suggestion. The work laid out for the Bureau of Emancipation is of immense magnitude. Two and a half millions of wards, driven from their accustomed shelters by the sharp catastrophes of war, landless, houseless, homeless, appeal to the government to guard and save them. From their earliest years deprived of the light of knowledge, they are children, able as yet to see only the star of freedom. They feel with hope and confidence that the flag which brings to them liberty will spread over them the mantle of its protection. In the heart of this great people every pulsation throbs for freedom. The instincts of national honor will allow no faltering and no failure in our duty to the oppressed freedmen, who stand shoulder to shoulder in this struggle for our country's safety and renown. I therefore honor you, gentlemen, who see your high duty, and mean to perform it.

The plan proposed in this bill is for the organization of a bureau in the War Department. Perhaps this is the best means of commencing the great work; but I think the time will soon come, if it has not already arrived, when the duties of this bureau will require the powers and merit the dignity of a *separate executive department.*

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There are several subjects which might be advantageously grouped together, and ought to be placed under the management of one controlling mind. Among them are the following: —

1. Taking possession, on behalf of the United States, of all real estate abandoned by its owners who have joined the rebels.

2. Taking possession of all real estate forfeited to the United States, to be sold for taxes, whether bought in by order of the President of the United States, or sold to settlers and others.

3. Taking possession of all lands confiscated by the United States.

4. Taking possession of all personal property of the enemy derelict, abandoned, or captured, except prizes at sea.

5. Taking care of and making provision for all persons now freed or hereafter to be freed under any laws of the United States or proclamations of the President, or acts of manumission.

6. Taking care of all colored men in the rebellious districts who were free before the war, and of all fugitives thereto from loyal States.

7. Regulating all legal proceedings for the *confiscation* of rebel property in all the courts. The United States attorney or special attorney to act under orders of the new department, so far as respects these proceedings.

8. The administration of all laws, rules, and regulations relating to the MIGRATION of colored persons to and from the *rebel States.*

9. And of all laws relating to the compensation, if any, which the government may hereafter give to aid loyal States in emancipating slaves.

10. Controlling all other matters relating to the emancipation, its processes, its rules and regulations, &c., and the protection of the interests of the colored men on one hand, and the United States on the other.

These subjects are intimately connected together; they would require genius, active energy, and powerful executive talent. The Secretaries of War and of the Treasury are already so overwhelmed with labor and responsibility, that it is ungenerous to demand of either of them to assume the herculean task. The labors of this Emancipation Department will be unsurpassed by those of any member of the Cabinet. Its importance to the ultimate issue of the war, to the reputation of our country abroad, to the moral character of our people in the Southern States, to the treasury, to the soldiers, and to the industrial interests of this great nation, can hardly be over-estimated. Whoever is competent to fill the office of Secretary of Emancipation should have a seat in the Cabinet, and should also enjoy the confidence and co-operation of that great and good man, whose proclamation of freedom has re-created a nation, and will cause his name to be venerated wherever the flag of the Union shall cast its shadow.

Very truly yours,

WILLIAM WHITING,
Solicitor of the War Department.

WAR DEPARTMENT, Jan. 7, 1864.

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[No. 10.]

LETTER RELATING TO CLAIMS AGAINST THE GOVERNMENT.

WAR DEPARTMENT, WASHINGTON CITY, January 15, 1864.

HON. ELIHU B. WASHBURN, *U. S. House of Representatives.*

SIR: Your letter of the 13th instant has been received, in which you have requested me to "state, if consistent with my views of public duty, the nature, extent, and character of the various claims which have come to my notice against the government, growing out of the loss and destruction of property during the present rebellion; and also to make any general suggestions on the subject that may seem proper."

In reply, I have the honor to state that a great variety of claims have been made against the United States, growing out of the loss or destruction of property in the Southern States. Damages have been claimed by loyal citizens, who have always resided in the Northern States, for real estate situated in the rebellious districts, and taken into possession of the Union troops for military purposes, as for quarters, or for storage, or hospitals, barracks, &c. Damages have also been asked, by the same class of persons, for personal property, as cotton, sugar, flour, horses, mules, wagons, agricultural implements, money of the United States, money of the Confederates, hay, grain, corn, and all kinds of forage; wood for burning, and wood cut down, but not removed from the spot when cut, and damages for crops trampled or eaten up by our cavalry, &c. But by far the larger proportion of claims is made by persons residing in the disloyal districts, for every species of real and personal property, alleged to have been used, injured, seized, or destroyed by our troops; for fences burned, crops trampled down or consumed by the army, horses, mules, beef cattle captured, seized and taken away; money, furniture, and household articles lost or stolen; cotton captured, burned, used, lost, or damaged by dirt or otherwise in the use of it for military or naval purposes. Every variety of personal property, lawfully captured by our forces, has been claimed, or damages have been demanded, for its use, detention, or destruction. Rents are continually requested for the use of real estate seized by our troops; property which has been condemned as lawful prize in our courts has been claimed, or its value in damages. And, what is singular, every claimant purports on affidavits to be a *loyal citizen*, even when, in some cases, it is well known to the department that the party really interested in the claim is actively engaged in rebellion at the time the claim is presented. Respectable gentlemen, on many occasions, act as claim agents on behalf of the parties interested.

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Often it happens that shift is made in the title, or apparent title, of property, in order that the party making the application may be deemed loyal. And were we to regard the evidence presented to this department as conclusive on the question of loyalty, it would be doubtful whether there is, or ever was, a disloyal person in the seceded States. Many claims have been made for property seized in attempts to violate the laws regulating commerce with the inhabitants of the rebellious States. Few if any instances have occurred of claims for the restoration of property seized *in transitu* on its course from Maryland, New York, or other States, to Virginia, without being accompanied by testimony of the loyalty, honesty, and high character of the criminal, even where he has been arrested and caught in the act of violating the law. Rebel printing offices have been gutted out; secession houses have been burned; arms and munitions of war have been seized; vessels have been used, seized, or captured by our forces; railroads have been taken for military use; their rolling stock has been worn out; tracks have been destroyed, bridges burned, or blown up, and every form of devastation and destruction has been inflicted on the enemy's property by our armies. For all these injuries, the inevitable result of warlike operations, indemnity is demanded of the government by *persons* claiming to be *loyal*, even though residing in the districts at war with us. Wherever the armies move, they scatter broadcast the prolific seed which will ripen into raids. As to the character of these demands upon the Treasury, so far as known to me, some of them have but a slight foundation in fact, many are purely fictitious, and a large proportion of them has been exorbitant and unreasonable. Sometimes the amount of annual rent demanded for a piece of real estate is equal to half or the whole of its value. The valuation placed upon many articles has been more than ten times their real worth; and as a general statement, these claims are of so gross and outrageous a character as to stamp them as fraudulent. Although some claims of this class are fairly stated, yet it would seem as though it were thought fair game by some claimants to rob the Treasury to any practicable extent.

In answer to the inquiry as to the amount of these claims which have been or will be brought against the government, I can only say that it is impossible to ascertain the aggregate. I believe that *hundreds of millions* of dollars will be required to satisfy these demands. If it were now understood that they were allowed and promptly settled in the War Department, and paid by the Treasury, I do not believe that we could carry on the war three months for want of money or credit. I look upon the army of claimants as really quite as formidable to the government as the army of rebels; and if this great and impending danger is not looked in the face, and promptly and decisively met by Congress, I shall feel a diminished confidence in the ultimate preservation of our national honor.

In regard to all claims arising in the rebellious districts, of the character above described, I have uniformly refused to acknowledge their legal

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validity, whether the claimant is loyal or otherwise. I have not felt at liberty to waive the legal right of the government to act according to its own will and pleasure in recognizing these obligations. The question as to what shall and what shall not be conceded to persons, whether loyal or disloyal, friendly or hostile, who reside in those parts of the country now in rebellion, is a question of *public policy* to be settled by Congress. Congress may or may not assume such obligations. If they should amount to hundreds of millions of dollars, Congress may refuse, by recognizing them, to add such an amount to our national debt; but if they should be of comparatively trifling amount, a different policy might be justified. Perhaps the time has not yet arrived when we can tell what is best to be done; for we do not know when the war will end, what will be the amount of our debt, nor what the extent of the demands upon our national resources. It therefore seems to me that we ought not to allow any court or tribunal to pass upon this class of claims in anticipation of the action of Congress, however small the amount involved may be; and the government ought not to commit itself, through any of its legislative or executive departments, or through the Court of Claims, or by any commissioners or other functionaries, to an acknowledgment of the validity of claims of persons residing or having property in rebellious districts while the war is going on.

Very respectfully, your obedient servant,

WILLIAM WHITING.

[No. 11. Extract from the Records of the War Department.]

CORRESPONDENCE WITH HON. G. W. JULIAN, M. C., RELATING TO CONFISCATED LANDS.

WASHINGTON, Feb 4, 1874.

HON. WILLIAM WHITING.

DEAR SIR: The committee on public lands of the House of Representatives would be much obliged for your views as to the best policy to be pursued by the government in dealing with confiscated lands in the rebel States, and lands sold for non-payment of taxes. Without some adequate legislation, these lands must fall into the hands of speculators, and constitute a land monopoly scarcely less to be deplored than slavery itself. The particular question upon which your views are sought is the propriety of such legislation as shall vest these lands at once in the United States, subject them to our land system as other public lands, and parcel them out in suitable homesteads to actual settlers, and particularly to those, whether white or black, who have served the United States in crushing the rebellion. The committee would be glad to have your opinion or any suggestions you may have to offer upon any other question connected with the subject.

Hoping the favor of a reply, I am, sir, very respectfully,

GEORGE W. JULIAN,

Chairman of Committee.

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SOLICITOR'S OFFICE, WAR DEPARTMENT,
WASHINGTON CITY, Feb. 9, 1864.

To the Hon. George W. Julian, Chairman of the Committee on Public Lands, House of Representatives.

SIR: Your letter, of which the foregoing is a copy, has been received, and in reply I have the honor to submit the following suggestions for the consideration of your committee: —

Public Lands as a Source of Revenue.

From the origin of our government down to a recent period, the sale of the public lands has been a constant source of revenue. But now, since settlements have been made upon the best agricultural districts, and sales have been effected of a vast extent of territory not yet settled, and especially since the enactment of homestead laws, the remaining lands are found to be of comparatively little value. While the exigencies of war have called for extraordinary expenditures, our revenue from lands has greatly diminished. Considerations of political economy, therefore, should lead us to ascertain whether there are other lands not yet exhausted, which the country has a lawful right to use for homesteads, for soldiers' bounty, and for supplying the demands of immigration; and to inquire whether financial necessity, public policy, humanity, and the re-establishment of peace upon a lasting basis, do not call on you to use or dispose of those lands to which the United States have acquired or may acquire title by reason of the civil war, in such manner as to maintain the ability of the government to carry on the war, and to pay its expenses.

Modes of acquiring Title by the United States.

There are several modes in which the United States may acquire title to lands in the rebellious districts; and among them are these: —

1. By confiscation in punishment of treason or of other crimes under municipal laws.
2. By confiscation as a right of war under the laws of war, by military seizure, or by processes *in rem*, as, for instance, by processes against absentees, refugees, &c., &c.
3. By process of judicial attainder of treason (a method not as yet authorized under any law of Congress).
4. By sales for non-payment of taxes.

Two distinct Lines of Policy open to the Government.

There are two distinct lines of policy by which our legislation on this subject may be governed.

1. That which treats the public enemy *merely* as *belligerents*, having a claim only to the rights of belligerents against the United States.
2. That which treats them as subjects of municipal statutes, and holds them as only liable to the penalty of violating the laws by engaging in civil war, and not as subject to the disabilities of a belligerent public enemy.

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Uselessness of Municipal Proceedings for Forfeiture.

It is obvious that proceedings in the nature of forfeitures or confiscations of the property of rebels treated merely as subjects under municipal laws, as administered to peaceful citizens under the guarantees of the Constitution, will not be efficient to vest in the United States the titles to any considerable amount of real estates. Statutes of limitation will soon cut off claims. Trial by jury will prove an impassable barrier against just verdicts in favor of the government, and public sentiment in rebellious States, after fighting ceases, will place the claimant to lands under titles by forfeiture in hazard not only of his estate, but of his life.

Proceedings in Rem.

Procedures against the real estate of rebels should be *in rem*, and not *in personam*. The title should be vested by law in the United States, by the act of abandoning the land in the seceded States; and no claim should be allowed to be set up to it by any *public enemy*, unless under such terms as the government or the President should prescribe; as, for example, on conditions, —

1. That the claimant shall appear *in person* to make his claim to the land, within a period of time to be fixed by law.
2. That he shall show that he has taken no part in the rebellion; or,
3. That he has taken and recorded the oath prescribed in the President's amnesty proclamation, and has kept it.

Procedures of this general character were used in and after our revolution, whereby the title of many estates were passed from the tories to the government or to purchasers under the government.

Constitutional Objections answered.

If this plan is objected to upon the ground that the Constitution provides that no person shall be deprived of property, &c., without due process of law, &c., &c., the answer is, that a *public enemy*, a *belligerent*, has no right against the union but the right of a belligerent; and having sought to overthrow our government and Constitution, he cannot at the same time claim rights under it. All persons residing in the belligerent States are in law *public enemies;* they and their personal and real estate, are subject to the rules of war, and therefore they may be killed in battle or expelled from the country, and their property may be captured and confiscated at the pleasure of their conqueror.

(See War Powers, Chap. II. See Decision of the Supreme Court in the Prize Cases, 2 Black's Sup. Court Reports, p. 635.)

Other Objections answered.

If it be said that proceedings *in rem* are not humane, our answer is, that true humanity consists in so conducting the war and its incidents as to subserve in the end the greatest good of the greatest number. Tenderness to heinous guilt may be cruelty to innocence. The whole number of slave-

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owning landholders, as compared to the whole population of the slave States, is very small; it does not exceed one in forty-eight. Of these, probably less than one half will be subjected to the laws of war. Less, therefore, than one man in one hundred will suffer the loss of real property by the most severe application of confiscation or sequestration laws. A cry against the severity of confiscating the lands of *an entire people* is a false alarm, since if the land of every slaveholder were taken away, only about one fiftieth of the people would be affected. And if these lands be again distributed *among the people* by permission of the government in the manner herein proposed, the clamor against confiscation will appear to all as absurd as it is unfounded. Confiscation will then operate only as a means of effecting a just and equitable distribution of public lands to those who were born and now dwell, or may dwell, upon them.

Whoever seeks to overthrow the Government thereby renounces all Claim to its Protection.

The rights of slave-owning landholders who are now in rebellion are, under the Constitution, to be determined by the laws of war. The laws of war are constitutional laws in time of war. Our forefathers framed a government able to destroy its enemies as well as protect its friends. And one of the delusions which this great contest is destined to expose, is that which accords to a hostile foe the rights of an ally or of a friend. If an incendiary sets fire to a house, he does not enter its burning walls for shelter against the weather, nor can those who are struggling to destroy a government at the same time claim its protection. This effort for its destruction is a renunciation of all claim to rights guaranteed by it in time of peace to innocent citizens.

The Dictates of Statesmanship and of Humanity.

Whatever may be the *legal status* of hostile confederates, and whatever may be their liabilities under the laws of war, there is no doubt that it is the part of a magnanimous and humane people to so use its belligerent rights as to destroy or expatriate only irreconcilable adversaries, and at the same time to protect its true friends, even though they are, in the eye of the law, deemed to be "public enemies." The exercise of the rights of war is the only shield by which the government can be preserved, while loyal men in the hostile districts are protected from their enemies and ours. It is fortunate for this country that there are no limitations *in the Constitution* upon our belligerent rights against a public enemy, even though that enemy consist of persons or communities who once owed, and still owe, allegiance to the United States. There is no control placed by the Constitution over the power of Congress to pass laws as to captures on land or sea, nor as to lands conquered or recovered from possession of public enemies, whether those enemies be composed of subjects owing us allegiance or aliens residing in foreign countries.

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Conquest of Rebel Subjects gives greater Belligerent Rights than Conquest of an Alien Enemy.

The conquest of a public enemy occupying, when conquered, lands over which, in peace and in war, the laws of the United States *rightfully extend*, gives the sovereign power effecting that conquest a far more complete dominion over the territory so conquered, and over the inhabitants thereof, than would result from the conquest of a foreign country peopled by aliens who never owed allegiance to the conqueror. There is no violation of the law of nations, nor of the laws of war, in putting in force whatever measures are really necessary to secure victory, and the legitimate fruits of victory.

What the United States gain and the Rebels lose in a Civil War.

The United States have, by civil war, lost none of their rights over the land, or over the inhabitants thereof, but have gained the power to put in force over both, the laws of war, and are released thereby from obligation to regard any of those privileges of the public enemy which would have belonged to them under our Constitution and government, if they had remained peaceful and loyal citizens. The enemy have escaped no obligations to the United States, but by their own act have subjected themselves to the loss of all rights under the government or against it, except those which may be conceded to them as belligerents. All further privileges given to the enemy, such as are contained in the proclamation of amnesty, cannot be claimed as of right, but must be received as a magnanimous concession made for the protection of those who will aid in supporting our government and restoring it to power.

Property of Malignant Enemies refusing Amnesty should be confiscated.

There is therefore nothing against the dictates of humanity, the laws of war, the provisions of the Constitution, or true policy, in pursuing the course of confiscation, municipal or military, against malignant slave-owning landholders, whose hands are red with the blood of our sons and brothers, *if they refuse to accept the amnesty offered by the President.* The humanity of a great nation has offered amnesty to public enemies while yet engaged in hostilities. Justice will enforce confiscation and exile on all who will not accept pardon and submit to the laws.

Title to Lands of great Value, will be vested in the United States. The use to be made of them.

If lands belonging to this class of enemies shall be promptly seized by our military forces, and faithfully applied to the public benefit, a vast amount of territory will be added to the public domain, and the country will have in its own hands, after the war is over, the means of carrying out magnificent schemes of public improvement, and of securing to the southern country, for the first time, the benefits of civilization. The admirable cli-

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mate, the fertile soil, the mineral and agricultural wealth of the Southern States would make each one of them worth far more than a Mexico to the Union, provided only that no impediment should retard or prevent the development of its industrial resources.

Amendment of the Constitution abolishing Slavery. Its Effect on Public Lands.

It is now conceded that slavery has been the cause of the war; that it constitutes the means by which it is sustained; that it is the chief obstacle to the restoration of the Union; and that slavery is to be removed. It has long been the wish of eminent and patriotic statesmen, that the Constitution of the United States should be so amended as to exclude involuntary servitude forever from the States and Territories, except in punishment of crime. And it is believed that this great measure will be proposed by Congress, and accepted by the people, within a few months. In this event, the subject of public lands will become still *more important*, and will press for immediate legislative action.

Large Estates must be divided. The Reasons for so doing.

Whether this measure be adopted sooner or later, it is necessary that the large landed estates in the South, which shall become the property of the United States, should be broken up into farms of moderate size, and be distributed among those having claims to the protection of government. Large estates in land are essentiàl to the perpetuation of slaveholding aristocracy, and of slavery itself. They furnish the means of reducing and of retaining a numerous but degraded population under the control of a small number of capitalists. Proprietorship of the soil renders all tenants subservient to the will and subject to the control of the owner. Estates of inordinate size retard and exclude internal improvements. It is also well known among agriculturists that very large farms are wasteful and comparatively unproductive. Subdivision increases productiveness. *Villages* are scarcely possible when many large estates are contiguous. Without villages, the country lags in its progress. The proprietor of large plantations, peopled by slaves and by poor whites more degraded than slaves, becomes a *feudal lord*, while his subjects are deprived of feudal rights; and such a petty sovereignty does not educate the master to become a patriotic and peaceful citizen of a republican form of government. Lands descending in the same family for several generations perpetuate a *quasi* feudal aristocracy, wherever the lords of the land inherit the subjects from whose toil it derives its value. The history of the states of South America, and especially of Mexico, where some of the proprietors own lands greater in extent than two or three of the smaller States in our Union, might well demonstrate the impossibility of preserving a permanent republican government over the proud, independent, selfish, turbulent, vindictive, and revolu-

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tionary spirits engendered by the inordinate accumulation of real estate in the hands of an oligarchy, even without the aggravating evils of slavery.

Speculators.

The destruction of slavery in the Southern States will not remove these evils, so unavoidable, yet so deplorable. Negroes and poor whites hired to labor on large plantations will suffer as severely from their employers as from slaveholding masters. Following the army, like crows after the battles, speculators are going south to purchase farms in the new Eldorado. They will have, to some extent, the control of negroes found there, even though they may hire laborers. They will prove a curse to the country and a curse to the negroes. Men of grasping avarice, who have no interest in protecting the life or health of their employés, will be far more unrelenting than slave-owners who have an interest in preserving what they claim as property. Experience in Tennessee and other States has already demonstrated that the negroes suffer more under lessees, who are determined to get rich in a hurry by raising cotton, than they formerly suffered from their selfish masters. It is shocking to learn that Union men, as speculators, are allowed to drive their laborers to unwonted activity in the field, and yet to withhold from them fair wages. To deprive this hard-hearted class of men of the temptation of buying great estates for the purpose of levying black mail upon the first earnings of freedmen, it is only necessary to require the lands to be leased or sold in small sections, and to actual settlers.

Other Reasons why the Land should be subdivided into small Sections.

There is but one way of recalling the common people of the South, who are non-slaveholders, to a hearty and honest support of the Union; and that is, by making the population of all parts of the country homogeneous. Small farms, free labor, diversity of occupations, general education, northern institutions, republican and not aristocratic ideas of the respectability of honest industry, the substitution of cheerful and hopeful productive labor in place of listless southern indolence, the thrift of profitable energy instead of the wasteful extravagance of unpaid toil, the exchange of the slave-driver's lash for the spur of self-interest, and of the slave-pen for the school-house, will produce, in a few years, a revolution more wonderful than all the hard-fought battles of this civil war.

The Lesson of History that the Restoration of the Union will be one of the Victories of Peace.

History records in all ages the same lesson. The first conquest is of arms; the last is that of arts. The triple wall of slavery, rebellion, and treason has, until now, kept out from the Southern States the rising tide of knowledge and of progress. Its swelling waters, long baffled, have at

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last broken through and over the dikes, and its crested waves, sparkling with phosphorescent light, are now dashing southward, sweeping away, in their irresistible movement, the ancient landmarks of barbarism and crime. When these fertilizing waters, having once deluged the land, shall have dried up, the hills and valleys of the South, purified and purged of all the guilt of the past, clothed with a new and richer verdure, will lift up their voices in thanksgiving to the Author of all good, who has granted to them, amidst the agonies of civil war, a new birth and a glorious transfiguration. Then the people of the South and the people of the North will again become *one people*, united in interests, in pursuits, in intelligence, in religion, and in patriotic devotion to their common country. Whatever may contribute to that result will be sanctioned by Christians and by statesmen.

The Missionaries of Liberty.

If soldiers who have fought for the flag on many a Southern battle-field; if emigrants, who bear with them a love of liberty, made more intense by the oppression of foreign tyrants; if Northern farmers, manufacturers, and merchants bred in the school of freedom, shall seek their homes in Southern States, as they doubtless will, encouraged and protected by manly legislation of Congress, the seed of liberty will by them be sown broadcast over the South. The institutions of the North will be established by every emigrant and every soldier wherever he plants his hearth-stone. Slavery being once abolished, there will be no backward movement in civilization; free labor, having a fair field, is sure to win.

Small Farms are Pledges of the Perpetuity of the Union.

If the southern lands which shall belong to the United States be divided into small farms, and owned by a large number of proprietors, every one of them will hold his homestead under title from the United States. Each proprietor will thus become bound to maintain the government. His homestead will be pledged by bond and mortgage to perpetuate the Union. Every farm will be Union stock. It will be a guarantee of the credit and good faith of the country. It will secure in the South all the benefits of the *credit mobilier*, or of the circulation of governmental currency. The larger the number of persons owning the same amount of land, the stronger is the government in the number of its indorsers. Such, then, are some of the reasons why the lands of the United States in the rebellious districts should be subdivided into small homesteads.

What may be done with Homesteads.

These lands, thus subdivided, are wanted for four important objects.

1. For bounties to soldiers who have been in active service, and to the widows or heirs of those who have perished therein.

2. For homesteads for persons, of whatever color, who, while the war continues, or after it is over, may be found resident thereon.

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3. For homesteads for those who shall emigrate southward.

4. These lands, not wanted for bounties or for homesteads, or the proceeds thereof, should be pledged for and applied to the extinction of the war debt.

Property abandoned by or taken from those who instigated the war should be appropriated to pay its expenses.

Freedom from Slaves, and Equalization of National Taxes.

If the issue be put to the people, Shall the South retain slavery and the North pay nearly all the taxes, or shall the South give up slavery and the North pay its just share of the taxes? there can be no doubt about the verdict.

A Principle of Political Economy.

To abolish slavery and cut up the lands of those slaveholders who will not accept the amnesty, and to distribute them as above suggested, would benefit the South even more than the North. For in a few years, the productiveness of the lands would be enormously increased by reason of improvements in agriculture, and by the conversion of eight millions of southern white men into *producers*, who are now *only consumers* of the products of the labor of four millions of slaves. To add such a vast source of wealth as this, will do more to develop and increase our wealth and our resources than the discovery of hundreds of mines of silver or of gold. This result of converting consumers into producers, interested in the perpetuity of our government, elevated in civilization, and with feelings so changed as to make them loyal citizens, is to be accomplished only by introducing among them northern improvements, northern institutions, and northern men to put them in practice. This end can be accomplished only by so managing the lands of the South as to render these great movements practicable.

Seizure of Lands. Bureau of Industry. Land Office System.

The first step in this direction is to seize the lands, and to acquire title as rapidly as possible.

The second step is, to place them in charge of proper persons, under the authority of the United States. (This is to be provided for by the bill for an Emancipation Bureau.)

The third step is to have the land system extended over these districts.

For without this precaution, there will be disputes as to proprietorship; disputes as to boundary; disputes as to titles of traitors and their agents; claims for indemnity; disputes as to the application of the Amnesty Proclamation; and an interminable train of difficulties.

The Land System.

By applying to the southern plantations the land system, the titles can be given and guaranteed directly by the United States. These titles will be

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reliable, and held sacred. The security of title will enhance the value of the lands for lease or for sale; and the government can, through its land officer, keep a correct account of all that is done with its property, and account for the proceeds thereof, and keep a register of loyal and disloyal men. If general laws are made, regulating the use or appropriation of such lands, these laws can be best carried into effect by the Land Office, and its surveys will be *conclusive*, both as to location of lots, and its grants or warrants may be made conclusive as to validity of title. By regulations of the Land Office, speculators can be kept off, settlers, soldiers, and emigrants can be protected most effectually. Considering all these things, it seems advisable that the land system of the United States should be extended to all such estates as vest in the United States as rapidly as possible. The disposition of these lands may be placed in the control of the chief of the Emancipation or Industrial Bureau. And it is desirable that lands of great value should not be sold, as they now are, for nominal prices, but that Congress should so legislate that these estates may be *held* for the benefit of the United States, or for such uses as they may be applied to hereafter by law.*

I am, Sir, very respectfully,

WILLIAM WHITING,
Solicitor of the War Department.

[No. 12. See page 20.]

LAWS FOR RAISING AND ORGANIZING MILITARY FORCES.

"*The United States may require all Subjects to do Military Duty.*"

The manner in which this power has been used by the government may be seen by reference to the acts of Congress under which the military forces of the United States have been authorized to be called into service since the commencement of our civil war. Soon after the rebellion broke out, the President, by virtue of the power conferred upon him in the act of Congress approved February 28, 1795, called forth the militia of the several States of the Union, to the aggregate number of seventy-five thousand men, by proclamation dated April 15, 1861. On the 3d day of May, 1861, under the provisions of the same statute, he called into the service of the United States forty-two thousand and thirty-four state militia as volunteers, and directed an increase of the regular army to the extent of twenty-two thousand seven hundred and fourteen officers and men. By the act of July 22, 1861, the President was authorized to accept volunteers, not exceeding five hundred thousand men, and by the act of July 25, 1861, Chap. 17, he was further authorized to receive any number, not exceeding five hundred thousand men, to be organized according to the preceding act, and to be mustered in for

* How far the policy recommended in this letter has been approved by Congress may be seen by examination of the Freedmen's Bureau Act of July 16, 1866, Chap. 200.

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"during the war." No volunteers have been received under this law. The act of July 29, 1861, Chap. 25, authorized the President to call forth the militia of any or of all the States, and to employ such part of them as he should deem necessary; and it further provided "that the militia so called into the service of the United States shall be subject to the same rules and articles of war as the troops of the United States, &c., and that their service shall not extend beyond sixty days after the commencement of the then next session of Congress, unless, &c., and that the militia so called into the service shall be entitled to the same pay, &c. as the regular army. The President was authorized, by act of July 31, 1861, in accepting the services of volunteers under the act of July 22, 1861, to accept the same without previous proclamation, and in such numbers from any state, as, in his discretion, the public service should require.

Although the right claimed in this essay, on behalf of the government, to call upon all its subjects, whether white or black, bond or free, to do military duty, was unquestionable, yet, in fact, colored men were at that time excluded by law from the regular army and from the militia of the States.

To understand the operation of the statutes by which colored men and slaves were, until 1862, prevented from belonging to the regular army, the reader should observe, that the act of April 24, 1816 (Chap. 69 section 9), provides "that the regulations [of the army] in force before the reduction of the army be recognized so far as the same shall be found applicable to the service; subject, however, to such alterations as the Secretary of War may adopt, with the approbation of the President." "Under this authority" (says Attorney General Cushing in his opinion dated April 5, 1853) "it is that the subsisting regulations for the army have legal effect." The army regulations have been repeatedly recognized by Congress, and never more frequently than during the recent rebellion. That they have the force of law the Supreme Court of the United States has several times decided. (See *Gratiot*, v. *United States*, 4 How. 117.)

On the 10th of August, 1861, new regulations *for the army* were approved and issued, and "ordered by the President of the United States to be strictly observed as the sole and standing authority upon the matters therein contained." Of these regulations as to the persons who could be enlisted in the army, No. 929 reads as follows: —

"Any *free white* male person above the age of eighteen and under the age of thirty-five, being at least five feet three inches high, effective, able-bodied, sober, free from disease, of good character and habits, and with a competent knowledge of the English language, may be enlisted," &c.

And this regulation was substantially the same as had been in force for many years previous to that time. It was not forbidden by any law of the United States, and it continued in force, beyond question, until July, 1862; and whether and to what extent it was then altered will be presently considered. Thus it is seen that by statute and by regulations of the War

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Department, made under-authority of that statute existing and in force from the year 1816 down to 1862, no other than free white persons could be enlisted in the army of the United States as soldiers. That the rules, so excluding colored men, were severely enforced under former administrations, is shown by the well-known fact that persons who had been enlisted in the army, and who, after enlistment, were suspected of having African blood in their veins, have been subjected to trial by military commissions, and upon proof that they were of African descent, have been dismissed from the service, because such enlistment was contrary to law. As a large proportion of officers in the regular army, before the war, were slaveholders or natives of slaveholding States, and as the government had been for many years prior to the rebellion administered in the interests and in accordance with the prejudices of slaveholders, it would indeed have been surprising to find slaves and negroes admitted by law to an equality with white men in the regular army as soldiers or as officers.

Colored men and slaves were also excluded, by the law of Congress, from the militia of the States.

None but free white persons could lawfully be enrolled in the militia of either of the several States from 1792 down to 1862. To ascertain who could not constitute a part of the militia of either of the States, it is not necessary to examine the statutes of the respective States, because, previously to the war, it had been settled by the Supreme Court of the United States that State legislatures could not constitutionally provide for the enrolment in the militia of any persons other than those enumerated in the act of Congress of May 8, 1792.* This act, which continued in full force until July, 1862 (and how much longer it is not now important to determine), defined who should and who should not be deemed by law as in the militia of the several States, viz., "Each and every *free*, able-bodied, *white* male *citizen of the respective States* who is or shall be of the age of eighteen years, and under the age of forty-five years, shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company within whose bounds such citizen shall reside," &c. No person other than those thus designated could by law be enrolled as part of the militia of any State; therefore no colored man and no slave could lawfully have been enrolled as a member of the militia of any State, so long as the statute by which they had been excluded remained in force. Such was the law down to July 17, 1862. Prior to that time no colored man or slave could lawfully enter the service of the United States either by enlistment in the regular army or by volunteering in the militia of any State in the Union. It is well known that General McClellan, under this state of the law has discharged from the volunteer forces a person who, though enlisted

* 18 Am. Law Rep. 167, 172.
22 Law Rep. 477.
See also Opinions of William Wirt, Attorney General.

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as a white man, afterwards was proved to have some African blood, and assigned, in a written order, his African descent as the reason for his discharge. Similar discharges for the same cause had been previously made from the regular army. All applications of colored men, including mulattoes, for permission to enlist as volunteers, have been uniformly refused by the Adjutant General of the United States, prior to July 17, 1862.

In accordance with the statutes and the rules and regulations of the volunteer service as administered by the President, by the War Department, and by all officers acting under it, slaves and colored persons were uniformly excluded from the military service of the United States until the passage of the militia act of 1862.

In July, 1862, two important statutes were approved, which authorized the President to employ persons of African descent.

The Confiscation Act, which was introduced into Congress in May, 1862, and finally was passed July 17, 1862 (Chap. 195), was entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." It provides, in Section 9, that all slaves of rebels or their abettors, who should escape and come into our lines, all slaves captured from or deserted by them, and all slaves found on or within any place occupied by rebels, and afterwards occupied by our forces, should be deemed captives of war, and should be made free.

Section 10 provides that escaped slaves should not be surrendered to their master unless he would make oath of ownership, loyalty, &c., and that military men should not pass judgment on the rights or claims of masters under the fugitive slave acts.

Section 11 provides that "The President of the United States is authorized to employ as many persons of African descent as he may deem necessary and proper for the suppression of this rebellion; and for this purpose he may organize and use them in such manner as he may judge best for the public welfare."

Section 12 provides for colonizing such persons of the African race as may be made free by this act, and as may desire to emigrate.

No provision is made in this statute for the payment of such persons as the President might thus "use;" but provision for keeping just account of their work, with a view of ultimately paying reasonable wages, was made by his general order. Although freed captives of war, of whatever sex or condition, might be employed for the general purpose of "suppressing the rebellion," no permission is contained in the act to use or employ persons of African descent as soldiers, unless the use of these persons "for suppressing the rebellion" necessarily implies that they may volunteer in the army as soldiers. If this phrase, "to use for the suppression of rebellion," stood alone, and if there were no other laws or statutes of Congress, no decisions of the Supreme Court, no rules of the War Department which have the force of law, no message of the President, no general orders of the Commander-in-Chief,

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and if there had been no debates in Congress, most, if not all, of which are irreconcilable with this construction of the meaning and intent of Congress in passing this statute, this view of its interpretation might be adopted. But these statutes, decisions, rules, debates, message, and general orders place it beyond question that such an interpretation of this act cannot be sustained. Those who were to be "used" for the "suppression of the rebellion" might be employed in camps, trenches, and fortifications, as laborers, cooks, servants, washerwomen, or as agricultural laborers in and around forts and military posts.

The fact that any and all labor or assistance which could be withdrawn from the rebels and transferred to the government weakened the enemy, increased our own resources, and therefore tended to "suppress the rebellion," affords satisfactory evidence that "employment for the purpose of suppressing the rebellion" does not necessarily imply fighting as soldiers. Therefore the true meaning of the phrase must be sought for by an examination of the system of military laws of which this act constitutes a part, and cannot be truly construed as if no other laws and no other parts of this statute were in force.

It will also be observed that no distinction as to the persons to be employed by the President is made between males and females, old and young, able-bodied and crippled. Hence it is not necessary, if it be reasonable, to construe this act as having application to the military service. It is obviously intended to enable the President to give employment to "contrabands" and "captives of war" by using them in such way as will, by withdrawing their labor from the rebels, tend to suppress the rebellion by weakening the enemy and strengthening us. Some mode of "regulating" large numbers of men, women, and children was necessary to secure order, industry, and peace; therefore the power was given to "organize" them. The contraband camp at Arlington afforded a fair example of an "organization" for agricultural purposes; and it is fortunate that the Arlington establishment was able to pay its own expenses, — no provision having then been made by this or by any other statute to support any "organization" by money to be drawn out of the treasury. That this act was not intended to authorize the systematic introduction of the persons therein named into the military service as soldiers, is obvious to every student of military law, inasmuch as, 1. No distinction is made between sexes or ages, and no limit is given to the number of individuals to be employed. 2. The authority to the President is to employ these persons and use them in such manner as he judges to be for the public welfare. Giving them "employment" and "using them," without referring in any way to military service, is language unlike any adopted before or since in any law of Congress which has reference to the raising of soldiers. 3. No provision is found in this act requiring those who are to be used to be able-bodied, or to have any single quality of a soldier. 4. No period of service is limited by law. No compensation, bounty, pension,

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monthly pay, or rations, are provided, or even referred to, by the statute. 5. The employés are not called or treated as "volunteers," or required to "enlist," or to be "enrolled," nor to be "mustered in" or "mustered out" of service. They were not designated as any part of the military forces of the United States. 6. Although it was generally conceded by just men, that slaves, who were willing to fight for their country, ought to be liberated from servitude, yet, as it was not the true intent of the act to authorize the enlistment of soldiers, it contained no provision for giving freedom to any person as a reward for such service as could be performed under that act.

In view of these marked features of this law of Congress, and especially of the facts that it did not require of persons employed under it any of the essential qualifications for military duty; that it did not attach or assign these employés to any class of troops, or to any arm of service; that it provided neither pay, rations, bounty, nor military organization for them, nor any means whereby money could be drawn from the treasury for paying them, — it is clear that it was not the meaning and intention of the legislature, by that act, to reorganize the army and introduce into the service the new element of colored soldiery. If such was the purpose of Congress, the language used in the statutes, the provisions inserted and those omitted would mark this as the most extraordinary specimen of legislation which has ever received the sanction of the committees on military affairs. In fact, the object of this statute was to give the President power to organize and employ freed slaves, captives, and colored persons, of either sex and of whatever age or condition, so far and in such way as he should judge it expedient, in order to enable them to support themselves, and thus to relieve the government from the expense of maintaining them in idleness, or to allow them to be colonized. Either course he might take would, as it was then thought, aid the government in suppressing the rebellion.

The interpretation of the act, as understood by President Lincoln, at the time when he approved it, is stated by him in his message to Congress of July 17, 1862 (See Notes, p. 406), sent to the House of Representatives with the approved bill, as explanatory of his views of its meaning. "The eleventh section," says he, "simply assumes to confer discretionary powers upon the Executive, without the law. I have no hesitation to go as far in the direction indicated as I may at any time deem expedient, and I am ready to say now, I think it is proper for our military commanders to employ as laborers as many persons of African descent as can be used to advantage." The orders issued by the President (General Orders No. 109, July 22, 1862) only five days after the passage of this act (cited in a subsequent part of this note) were in strict accordance with this understanding of the law. It required military and naval commanders to employ as laborers, within and from certain States, so many persons of African descent as could be advantageously used for military and naval purposes, giving them reasonable wages for their labor. That this act was not designed to authorize the

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general introduction of colored persons as soldiers into the army, is also apparent from the fact that another act, passed by Congress the same day, was enacted for that express purpose.

The act of July 17, 1862 (Chap. 201), was introduced into Congress but a few days before its passage. It was entitled "An Act to amend the Act calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions, approved February 28, 1795, and the acts amendatory thereof, and for other purposes."

This law, under which colored persons were, in fact, introduced into the military service of the United States, provides (Section 1) that, whenever the President shall call forth the militia of the States, to be employed in the service, &c., he may specify the period for which such service shall be required, not exceeding nine months. If, by reason of defects, &c., it shall be found necessary to provide for enrolling the militia, the President is authorized to take certain measures for that purpose; "and the enrolment of the militia shall in all cases include all able-bodied male citizens between eighteen and forty-five." By this law, for the first time, all able-bodied male citizens who were not white were to be enrolled in the militia of the States. Section 2 required the militia, when called into service, to be organized in the mode prescribed by law for volunteers. Section 3 authorized the President to accept one hundred thousand volunteers (nothing being said about their citizenship or color) as infantry for nine months. Section 4 authorized the acceptance of other volunteers (no reference being made to their citizenship or color) to fill up existing regiments. Section 12 enacts, "That the President be, and is hereby, authorized to receive into the service of the United States, for the purpose of constructing intrenchments or performing camp service, or any other labor or any military or naval service for which they may be found competent, persons of African descent; and such persons shall be enrolled and organized under such regulations, not inconsistent with the Constitution and laws, as the President may prescribe." Section 13 provides that when any man or boy shall render such service as is provided for in this act, if he be a slave and his master a rebel, he shall have his freedom, and the freedom of his mother, wife, and children, if they also belong to rebels. Section 15 provides that all persons who have been, or shall be hereafter, "enrolled in the service of the United States under this act," shall receive the pay and rations now allowed by law to soldiers, according to their respective grades, *Provided*, that persons of African descent, who, under this law, shall be "employed" (in any camp service, intrenchment service, or other labor, or military or naval service), "shall receive ten dollars per month and one ration, three dollars of which monthly pay may be in clothing." They were also entitled (by Section 16) to their freedom, and, under certain circumstances, to the freedom of their families.

The language used in Section 15 is inaccurate. It was certainty not the intention of the act that all persons who shall be merely enrolled in the

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service of the United States should be paid; for this interpretation of the act would require the payment of all the militia of the United States to be made on a mere enrolment of their names, without reference to their employment as soldiers. It was doubtless intended to provide that "all persons who have been or shall be enrolled and employed in the service of the United States under this act shall receive pay," &c.; then follows the proviso, that persons of African descent, who (having been enrolled) shall be also employed under this act, shall receive ten dollars per month, &c. Both classes of volunteer militia, white and colored, were required to be "employed" in order to become entitled to the rations allowed by the statute. Section 14 provided that the expenses incurred in carrying this act into effect shall be paid out of the general appropriation for the army and volunteers. Colored men employed under this act being liable to perform military or naval service, were to receive rations, and be paid out of the same fund as other soldiers and sailors in the same service. By this act, for the first time the President was empowered to receive certain persons of African descent into the service of the United States, who were "to be enrolled" in the militia; they were to be organized under military regulations, and were authorized to be received into the military service, to be "employed" on the same duties as other soldiers; in the language of the first section, "to be employed in the service of the United States," and to be paid by paymasters out of the general appropriation for the army and volunteers. The word "employed" is used by the statute in relation to the white militia of the States, as well as to colored men enrolled under this act; therefore the use of that word indicates no difference between soldiers of different colors as to the character of their service.

All persons so employed were called out under a law of which the title itself plainly indicated the character of the service they were intended to perform. It was entitled "An Act to amend the Act calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, approved February 28, 1795, and for other purposes." As the enrolment of the militia was required by the first section "in all cases to include all able-bodied male citizens between the ages of eighteen and forty-five years," and as, by the fifteenth section, "all persons thus enrolled were to receive the pay and rations now allowed by law to soldiers according to their respective grades, except that persons of African descent were to receive ten dollars per month," it is plain that this statute (of July 17, 1862, Chap. 201) was intended to regulate, and in terms too clear to be easily misunderstood, did regulate and limit the pay to be thereafter given to all persons, whether white or colored, who should become soldiers in the army. All able-bodied male citizens between eighteen and forty-five years of age were to be enrolled, and all such persons of African descent were to be included in the enrolment. All persons thus enrolled who should serve in the army, regular or volunteer, were to receive the pay and rations provided for by previous statutes; excepting only, that persons of African descent were to

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receive their freedom, if they were slaves, and ten dollars per month, and rations; while soldiers not of African descent were to receive thirteen dollars per month and rations, bounty, &c.

The confiscation act and the militia act were passed and approved on the same day. It is obvious that Congress did not intend that these acts should be inconsistent with each other. They would have been inconsistent if the confiscation act be so construed as to authorize the President to enlist colored volunteers in the army. The militia act required all able-bodied males of African descent between the ages of eighteen and forty-five years to be enrolled, and when so enrolled, to be organized as part of the military forces. The confiscation act authorized the President to employ as laborers all persons of African descent in such manner and under such organization as he might deem expedient. If the President performed his duty under the militia act, by enrolling all able-bodied males of African descent between the ages of eighteen and forty-five years, and organizing them as part of the military forces, there could have been no persons of African descent capable of becoming soldiers, except those who had been thus enrolled. There could therefore have been no colored persons not already enrolled, or liable to be enrolled, in the military forces, and therefore none who could have become volunteer soldiers under the confiscation act, unless its provisions are in conflict with those of the militia act, even if the President had invited or allowed enlistments under it. It is not easy to believe that Congress intended by one act to confer upon the President full discretionary power to employ a large number of colored persons as soldiers, and by another act, passed the same day, to take that power from him; or to require him, by one law, to enroll all colored males of the age for military duty, and to treat them as part of our military forces, and at the same time, by a second law, to require or allow him to violate the first.

Whatever may have been the extent of authority conferred by the confiscation act upon the President to "organize persons of African descent in such manner as he might judge expedient for the public welfare," he did not deem it lawful or expedient to allow any persons of African descent to be organized under this act as any part of the military forces of the United States. Neither General Lane, who recruited the first colored regiments in Kansas, nor any of those who followed his example, ever received any order, or had authority from the President, for organizing troops of African descent under the confiscation act. Such regiments were, without exception, recruited and enlisted under the militia act or acts for raising volunteers for the army or navy. Though the militia act limited the pay of colored troops to ten dollars per month and one ration per day, and though this inequality of pay at that time between the colored and white soldiers was a subject of deep regret on the part of the author and of many others who felt its injustice, yet to deny that these persons of African descent were in fact enrolled and organized under the militia act, or

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to assert, with a view of avoiding its provision limiting their pay to ten dollars, that they were enlisted as volunteers under the confiscation act, would be not only a violation of the plain meaning of the laws themselves, but would require us to falsify the official records of the War Department, which show that in truth no enlistment in the volunteer service under or by authority of the confiscation act was ever made. If the President had the power to receive recruits under that act, he never used it; and no person of African descent can truthfully assert that he was ever enlisted as a soldier under it. Prior to 1863, persons of African descent could become a part of the military forces of the United States only by virtue of the act of July 17, 1862, Chap. 201.

The use actually made by the President of the powers conferred on him by the two acts of July 17, 1862, Chap. 195 and 201, was such, that none but laborers were ever employed under the former; colored soldiers were employed only under the latter. If enlisted under the militia act, colored soldiers were entitled only to ten dollars per month and rations. To make out that volunteers of African desent were entitled to higher pay than this statute provided for, it was necessary to show that they were not enlisted under the authority of that act. And as they claimed to have entered the military service under one of the acts of July 17, 1862, they were obliged to argue that the militia act was not intended to raise militiamen, but was intended to authorize the President to hire laborers, while the confiscation act, as they argued, authorized him to raise volunteers — a militia act to authorize the employment of men, women, and children as laborers, and a confiscation act to raise militia. They were doubtless not aware that while, in truth, no colored person was ever employed or enlisted as a soldier under that act, if such enlistment or employment had occurred, there was no provision of law, and no appropriation of Congress, by which it would have been possible to draw a dollar out of the treasury for their payment.

If the confiscation act gave the President power to enlist colored men in the army, it would still be necessary to show that the President used his power, and actually permitted such enlistments, before any claim for pay could be made by reason of such enlistment, even if the act had provided for any payment. It will be instructive to see how the authority conferred by this act was in fact used, in order to ascertain what was the contemporaneous construction of that power by the one upon whom it was conferred.

On the 17th of July, 1862, as previously stated, two acts were approved, one of which authorized the President to employ and use, in such manner as he should judge best, as many persons of African descent as he might think proper for the suppression of the rebellion. What was the manner of employing these persons of African descent adopted by the President under the confiscation act of July 17, Chap. 195?

On the 22d July, 1862, the President, in carrying out the provisions of this law, issued the following General Orders, No. 109, which directed,

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II. "That the military and the naval commanders should employ as laborers, within and from said States, Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, so many persons of African descent as can be advantageously used for military and naval purposes, giving them reasonable wages for their labor."

III. "That accurate accounts be kept both of property and labor of Africans, in order to settle accounts justly."

This order is strictly confined to the employment of "laborers," only, from and within the rebellious States. Under that order, "laborers" have been employed and paid for service in camps, forts, &c., &c.; but no persons have been, or could be, so employed as soldiers, for it is confined exclusively to laborers for wages. Their accounts for work and labor done were to be "accurately kept" and "justly settled." Their property accounts were also to be included. Females, whole families of men, women, and children, might be, and in fact were, employed for military or naval purposes, in menial labor, in forts, camps, and trenches. If the President had deemed these persons so employed soldiers, and entitled to full bounty, pay, and rations, including pensions, &c., he would not, and could not, have issued the foregoing order, but would have required enlistment and other military proceedings, and they would have been regularly paid by paymasters out of money in the treasury; but, on the contrary, he construed the law as applicable to laborers only, and confined his exercise of power under that law solely to the reception of laborers, and to their payment as such, and did not include soldiers. If a law authorizes the President to employ certain persons at his discretion, no one can enter the service of the country under that law without being authorized to enter it by him; and as he has given no authority to any person to enlist as a soldier under that act, no one can have entered the service as a soldier under that law. No slave or colored person can therefore lawfully set up a claim to payment under the law of 1861, or any other law, as a soldier, by assuming that he was accepted into the military service by any act of the President under authority of the statute of July 17, 1862, Chap. 195. No person has in fact ever been received as a soldier under that act. (See Records of Adjutant General's Office, War Department.)

On the other hand, soon after the passage of the militia act of July 17, 1862, Chap. 201, which expressly authorized the raising of colored troops, the President exercised the power conferred on him by that act, and authorized General Lane, senator from Kansas, to raise one or more brigades of volunteer infantry, without limiting him as to the color of the troops to be raised.

The following is the order: —

WAR DEPARTMENT, WASHINGTON CITY,
July 22, 1862.

HON. JAMES H. LANE, KANSAS.

SIR: You are hereby notified that you have been appointed by the Secretary of War commissioner for recruiting in the department of Kansas.

You are requested to proceed forthwith to raise and organize one or more

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brigades of volunteer infantry, to be mustered into the service of the United States for three years, or during the war.

For this purpose full authority is hereby conferred upon you to establish camps and provide for the maintenance of discipline and the supply of the troops with the munitions of war.

On your requisition the commanding general of the department will issue supplies of arms and accoutrements, clothing, camp equipage, and subsistence. Transportation for recruits and recruiting officers will be furnished on your requisition or refunded on vouchers in the usual form, accompanied by your order directing the movement.

It is recommended that the provisions of General Order No. 75, current series, be followed as far as possible in organizing companies, to the end that muster rolls may be uniform and authentic. This is necessary in order to secure justice to the soldier and prevent confusion in accounts and loss to the government.

In performing these duties you are authorized to visit such places within the department of Kansas as may be necessary, for which purpose transportation will be furnished you by the commanding general on your requisition, or the cost of the same will be reimbursed by the Secretary of War from the army contingent fund.

You will be expected to report frequently to this department the progress and prospect of the work, and to make any suggestion that may occur to you from time to time as useful in facilitating its accomplishment.

This appointment may be revoked at the pleasure of the Secretary of War.

By order of the Secretary of War,

(Signed) C. P. BUCKINGHAM,
Brig. Gen. and A. A. G.

(Official.)
THOMAS M. VINCENT,
Assistant Adjutant General.

Senator Lane, of Kansas, by virtue of this order, proceeded to raise one or more regiments of colored soldiers as volunteers, as he has personally informed the author, under the provisions of the act of July 17, 1862 (Chap. 201). These colored volunteers entered the service under that act, and have been paid as soldiers, in accordance with an opinion of the Solicitor of the War Department, which received the sanction of General Lane, ten dollars per month and one ration per day from that time to the time of their discharge.

The following is extracted from the records of the War Department: —

ADJUTANT GENERAL'S OFFICE,
WASHINGTON, D. C., May 30, 1863.

Indorsement on letter of Hon. J. H. Lane, U. S. S., dated Washington, D. C., May 27, 1863 (K. 258, V. S.). Requests that the first regiment Kansas colored volunteers be paid, &c.

Respectfully referred to the Paymaster General, in order that these troops may be paid under Section 15 of the act approved July 17, 1862 (Chap. 201), (G. O. 91, 1862).

By order of the Secretary of War,

(Signed) THOMAS M. VINCENT,
Assistant Adjutant General.

(Official Copy.)

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From the foregoing facts it is seen that whether President Lincoln was or was not authorized to enlist colored soldiers, under the provisions of the confiscation act, as contended by some, he did not in fact make any such enlistments. The claim of certain colored soldiers for payment on the ground that they were enlisted under that act is also shown by this fact to be absolutely without foundation. To support such a claim, the President must have been so misled as to assume or assert facts which he personally knew had no existence. The only use the President ever made of the power of employing persons of African descent, conferred on him by the confiscation act (Chap. 195), was to employ them as laborers for wages, as stated in his general order above cited; while, under the power conferred on him by the militia act, as in the case of General Lane's regiments, he caused colored persons to be enrolled, and employed, and paid ten dollars per month as militia. By reason of his honest and faithful administration of the laws on this subject, he was temporarily subjected to unjust censure.

The records of the Adjutant General's office, in the War Department, show that no colored persons were admitted into the military service as soldiers until after the passage of the act of July 17, 1862 (Chap. 201). No enlistments of colored soldiers had been made prior to that date, under the provisions of either of the preceding acts of Congress for the volunteer or regular army. Yet, at one time during the war, the question was raised by some of the friends of colored troops, whether persons of African descent, who enlisted as volunteers subsequently to the passage of the act of July, 1862, which provided for paying them ten dollars per month and rations, might not in some way escape from this limitation of their pay, and entitle themselves to the same pay, rations, and bounty as white volunteers? There was then no law of Congress by which such persons could enter the service of the United States as soldiers in the army except under one of the two acts of July 17, 1862 (Chap. 195 or Chap. 201). If colored persons were employed under the power conferred in Chap. 201, the amount to be paid soldiers for military service was, in express language, limited to ten dollars per month and rations. The only way of avoiding the effect of this statute was to claim that colored men had enlisted as soldiers under the confiscation act of July 17, 1862 (Chap. 195). Unfortunately this claim was not founded in fact, but quite the contrary, as was well known to those who had access to the records of the Adjutant General's office in the War Department. If that claim had been founded in fact, there was no law of Congress which provided for pay or bounty to persons employed by the President under that act; and the Treasury Department could not, and the author had reason to believe did not, deem itself authorized to pay any money out of the public funds for such service, no appropriation having been made for that purpose. If the colored soldiers had not enlisted under the act of 1862 (Chap. 201), they would have had no claim,

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under any statute, against the government for payment for their services, nor would they have had a claim to the freedom of themselves and of their families, as provided for in this act. It was the denial of the unfounded claim, set up in behalf of the colored soldiers, and the recognition of their real claims against the government (under Chap. 201), that enabled the colored soldiers to secure by law the amount of pay allowed them by that statute, and the freedom of themselves and of their families.

Some of the friends of the colored volunteers entertained at one time an idea that if the President had employed persons of African descent under the authority conferred on him by the confiscation act of 1862 (Chap. 195), they might be supposed or assumed to have enlisted under one of the prior acts for calling out volunteers; but no such idea is sanctioned by those who are acquainted with the military statutes of the United States; and if there were nothing in the law against such a supposition or assumption, the fact, as recorded in the Adjutant General's office, is, that no such enlistments were ever made, and therefore no money could be lawfully paid out of the treasury upon an assumption of a fact known by every officer in the War Department to be without foundation.

An opinion of the late Attorney General Bates is not in accordance with the views here expressed in relation to the true meaning of the two acts of July 17, 1862. He argues to show that the confiscation act was intended to authorize the raising of volunteer militia; and the militia act was to authorize the enrolment, organization, and use of laborers and servants. He also assumes the fact that soldiers were enlisted under the authority of the confiscation act. The first of these propositions has been shown to be not in accordance with the true meaning of Congress in passing the act, and the second is not in accordance with the truth. He also states, as the foundation of his opinion, that there was nothing in the laws of the United States prior to the acts of July 17, 1862, which prevented colored persons from enlisting in the military service of the United States, and as confirmation of this statement has cited what he supposed were all the statutes of importance on that subject. Unfortunately he has overlooked, in his researches, the act of Congress of April 24, 1816 (Chap. 69, Sect. 9), which gives the rules and regulations of the War Department the force of law, as decided by the Supreme Court (4 How. 117), and the army regulations of August 10, 1861 (Art. 929), and the act of Congress of May 8, 1792 (1 United States Statutes, 271),* well known as "the foundation of the military system of the United States," † all of which have been cited in this note. His opinion shows that he was not aware of the facts as to enlistments recorded in the War Department, nor the general orders of President Lincoln above quoted. If these facts and these acts of Congress, the decisions of the Supreme Court and the President's orders, had

* Brightly's Digest of the laws of the United States, p. 619.

† Speeches of Senators Sumner, Grimes, Collamer, and others, pp. 494–507.

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been called to his attention, or if he had attended the debates in Congress while the two acts of July 17, 1862, were under discussion (quoted in the Appendix, pp. 494–507), it is believed that no one would have seen, more readily than himself, the error in law and the mistake of facts on which his opinion was founded.

On the 25th of August, 1862, the Secretary of War wrote a letter of instructions to Brigadier General Saxton, which authorized him to organize in South Carolina a number of laboring forces not exceeding fifty thousand, to be paid from five to eight dollars per month; also to receive into the service of the United States such number of volunteers of African descent as he might deem expedient, not exceeding five thousand in all; to detail officers to instruct them in military drill, discipline, and duty, and to command them. "The persons so received into service, and their officers, to be entitled to and receive the same pay and rations as are allowed by law to volunteers in the service." Under these instructions the First South Carolina Volunteers were recruited, Colonel T. W. Higginson, of Massachusetts, commanding; but the payment therein promised was for a long time withheld, the Secretary of War having found that he had exceeded his lawful authority in making the promise. But it was held by the author, who was then Solicitor of the War Department, that this letter was a pledge of the Secretary, on which these volunteers had relied, and that the Department was bound in good faith either to discharge them from service, or to pay them according to promise. The Secretary did not discharge these soldiers, but the Solicitor made an immediate and urgent application to Congress for such legislation as would enable the Treasury Department to redeem that pledge. On the 3d of March, 1865, an act was passed, which (Chap. 79, Sect. 5) provides that colored soldiers enlisted, by Generals Hunter and Saxton, under authority of the Secretary of War, dated August 25, 1862, and which declared that the persons so received into the service, and their officers were to be entitled to and receive the same pay and rations as are allowed by law to other volunteers in the service," and in all other cases where it should be made to appear to the satisfaction of the Secretary of War, that any regiment of colored troops had been mustered into the service of the United States under any assurance by the President or Secretary of War, that the non-commissioned officers and privates of such regiment should be paid the same as other troops of the same arm of the service, shall from the date of their enlistment receive the same pay and allowances as are allowed by law to other volunteers in the military service." Under this law, the troops raised by General Saxton, including the First South Carolina Volunteers, were paid, and thus the pledge of Secretary Stanton was faithfully, even though tardily, redeemed.

Of all the officers connected with the War Department, none made, from the beginning of the rebellion, more energetic and effectual efforts to introduce

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colored troops into the military service than the Assistant Secretary of War, Hon. Peter H. Watson. His disinterested, patriotic, and invaluable services to the country are none the less honorable because his extreme modesty has prevented their becoming generally known to the public. Whenever a history of the War Department, during President Lincoln's administration, shall be truthfully written, no name will be recorded of purer lustre than that of him who was the fearless mentor and the trusted friend of Secretary Stanton.

Debates in Congress on the Militia and Confiscation Acts of July 17, 1862.

The debates in Congress upon the confiscation act and the militia act; the explanations of their respective authors; the various amendments which were proposed, and accepted or rejected; the language finally adopted, defining the character of the service to which colored men were to be introduced; and the discussion, in the speeches of several leading senators, upon the phraseology finally adopted, will place the true meaning of Congress, in passing both of these acts, beyond any question or doubt, and will show that the militia act was intended to provide for raising militia-men.

A review of the remarks made by the members of the Senate and House, including those of the persons who introduced and proposed these acts above cited, will show how earnest was the contest which resulted in introducing colored soldiers into our military service, and will also make it clear that the confiscation act, July 17, 1862 (Chap. 195), so far as it related to the use of colored persons and slaves, was not intended to make them a part of the organized military forces of the United States, for the purpose of fighting the enemy, nor will any person who reads these debates be likely to doubt that the act to amend the militia act of 1795, so far as it relates to slaves and negroes, was designed to introduce negro soldiers into the military service as part of the national forces.

It is not to be supposed that Congress passed two acts (a confiscation act and a militia act) on the same day, for the same purpose, and it must be presumed that each act has its proper object, and that each sought to accomplish something not accomplished by the other. Which, then, of these two acts was intended to raise soldiers to fight battles, and which was intended to employ laborers to hold forts in hot climates, carry burdens, dig trenches, groom horses, cook, wash, black boots, and wait on tables? Was the confiscation act intended to make soldiers; and the militia act to enroll and discipline waiters, servants, &c.? or was the militia act intended to make militia-men of colored volunteers?

A review of the history of these two bills in Congress, of their objects as explained by their authors, of the objections made and amendments offered, will remove all doubt, if any has existed, as to the true meaning of these

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acts, and will show conclusively, as understood by the members of the legislature generally, when these acts were passed, viz., July 17, 1862, —

1. That no colored men were then in the military service of the United States as enlisted soldiers.

2. That they had been excluded by law from the militia and from the army.

3. That one of these acts (Chap. 195) was to empower the President to employ laborers.

4. That the other of these acts (Chap. 201) was to empower him to make colored men soldiers, providing for their pay ten dollars per month.

The Debates in Congress on the Acts of July, 1862.

In 1861 no attempt appears to have been made to legalize the employment of negroes as soldiers. The first bill which gave power to the President to make use of colored persons, in any way, for the suppression of the rebellion, was that which was reported by Mr. Senator Clarke, May 14, 1862, from the select committee on confiscation. (S., No. 310.) The title of this bill was "to suppress insurrection, punish treason and rebellion, and for other purposes." (Globe, p. 2112.) On the 16th of May it was taken up for consideration in committee of the whole (Globe, p. 2165), and it contained, in the identical words as passed in the statute July 17, 1862 (Chap. 195), the clause relating to the "employment of persons of African descent." The discussion was continued on the 19th of May, when a motion was made by Senator Powell to strike out that section relating to the employment of persons of African descent; and the motion was lost by a vote of yeas 11, nays 25. During the discussion, Senator Henderson expressed an objection to arming or to employing negroes, and charged that the use of them was an act of cruelty. Senator Clarke, in explaining the meaning and intent of this clause of the proposed statute, said, —

The committee did not adopt that provision hastily and without consideration, nor unadvisedly. They adopted it deliberately. They considered it carefully. They amended the proposition first proposed, and endeavored to put it in such a shape as would be satisfactory to the country, if they could do it; and I beg the senator to consider the position in which we are. The summer is coming; our troops are in a hot climate; they are in a warm latitude. It is reported that already one or two cases of yellow fever have appeared in New Orleans. Our men are to die here like sheep and dogs, and that is what the rebels are aiming at. Are your prejudices to stand in our way, when we see our sons and brothers rotting there, to prevent us employing Africans, who can stand that climate, in order to preserve the lives of our kindred? and are we then to be accused of barbarity? Our humanity is such that we want the white man out of that climate, where he cannot stay without certain death, and put in a man who can stay, and who will be loyal; and I hope it is no offence to humanity, nor to Christianity either, to do it.

We do not desire to arm the negro universally. We desire to take as

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many of them as may be necessary, in the judgment of the President, — and he is a humane man, — and put them into these fortifications, and into these cities, and hold them from the rebels. If we did not do that, what would be the case? Down in New Orleans, when our men were cut down with disease, and lying in the hospitals, and could not raise a gun or lift a sword, these rebels would sweep in upon them; the whole force would be swept away, and we should have all this work to do over again. Let us take the men who can bear the climate. Having accomplished our purpose in securing these places, let us hold them. Let us show these people, when they threaten that they will draw us into that climate, and our men shall die, that we have a way to meet it; we can employ those who can stand the climate, and preserve our own brothers and our own sons.

MR. HENDERSON. . . . I wish merely to suggest to the senator, in all kindness, — and I do it, knowing, I believe, what I am saying, — that if we have to trust, to put down this rebellion, to the negroes of the cotton States, we never shall put it down, — never on the face of the earth.

MR. CLARKE. . . . . Nobody suggested that, and nobody proposed it. We propose to put it down, and we propose to hold it down by the black man, if we cannot in any other way, while the yellow fever, and disease, and plague sweep our men away. We do not propose to let the rebel have as his ally the yellow fever and the plague; we propose to subdue even that, and to hold these places. We propose to put it down by the loyal men and the free citizens of the government; but if these rebels will resort to that course which makes it necessary for us to do it, we have no choice, in saving the lives of our sons and brothers, but to do it; and, so help us God, we will try. — *Globe*, p. 2200.

From these remarks it is obvious that it was not the intent of the committee who reported this bill, nor of the chairman of the committee, to arm the negro universally, or to trust to the negro to put down the rebellion. "Nobody suggested that" — "Nobody proposed it."

"We propose to employ Africans in New Orleans, where our men die like sheep and dogs" — "to employ Africans, who can stand the climate, in order to preserve the lives of our kindred." "We desire to put them into the fortifications and into those cities, and hold them from the rebels."

"We propose to put the rebellion down by the loyal men and the free citizens of the government; but if the rebels resort to that course which makes it necessary for us to do it, we have no choice, in saving the lives of our sons and our brothers, but to do it."

The declaration of Mr. Clarke was, therefore, very far from a statement that the object of this 11th section of the confiscation act was to authorize the general arming of the colored men, and introduction of colored soldiers into the volunteer army of the United States; and no further statement appears to have been made on that point during the remainder of the session, and no further objection was made by any member of the Senate or House to this section of the confiscation act, although many members were steadily opposed to arming the negroes as soldiers.

The next effort made in that Congress was by Mr. Sedgwick, of the House. He attempted, in the House Committee on confiscation, to get

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a clause inserted in this confiscation bill, to authorize the employment of colored soldiers. But this proposal was voted down in the committee. He had leave to propose such a plan in the House as an amendment to the report of the committee. He did offer such a proposed amendment, May 23, 1862, in the House. This amendment made it the duty of every commanding military or naval officer, whose military district shall embrace any portion of the States of Virginia, North Carolina, South Carolina, Georgia, Tennessee, Alabama, Louisiana, Florida, Texas, and Arkansas, to enroll and employ such loyal persons (without regard to color) in the service of the United States, giving freedom to such persons, if held as slaves, &c. This plan was advocated by an able speech from Mr. Sedgwick. The vote on his amendment was taken on the 26th of May, and it was lost by yeas 32, nays 116; and among the nays (voting against the use of the negro as a soldier) were several gentlemen now among the most ardent supporters of that measure. (See *Globe*, p. 2361.) On the 18th of June, 1862, Senator Hale asked leave, by unanimous consent, to introduce a bill (No. 357) "concerning enlistments in the military service of the United States."

It provided that, "Whenever the public service requires further enlistments of recruits for the army, either of regulars or volunteers, the President shall issue his proclamation to the people of the United States, inviting enlistments from all the people, without distinction of race, color, or condition; that every slave who shall enlist and be received into the military service shall be immediately and absolutely free from all claim of service, except that which he submits himself to by such enlistment; and that every person of color, bond or free, who shall enlist into the military service of the United States, shall be entitled to all wages, bounties, and privileges allowed by law to any soldier enlisted into the army."

This bill was referred to the committee on milltary affairs. If the law then authorized the enlistment of negroes, why was this project brought forward by Senator Hale? This bill did not pass. On the 8th of July, 1862, near the end of the session, Senator Wilson, by direction of the committee on military affairs, introduced a bill (No. 384) to "amend the act calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion; approved February 28, 1795." (*Globe*, p. 3178.) On the 9th of July, Senator King was instructed by the committee on military affairs "to report a bill (No. 386) to provide for receiving into the service of the United States persons of African descent, for work on intrenchments and other war services." (*Globe*, p. 3188.) The same day Senator Wilson's bill (No. 384) was called up. Senator Grimes (*Globe*, p. 3198), moved an amendment whereby colored men could be called into service in the same way as white men, and all should alike "receive the pay and rations of soldiers, as now allowed by law according to their respective grades."

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MR. SAULSBURY. . . . If anything has contributed more than another to the disasters which have followed the Federal arms, it has been, in my judgment, the persistent attempt to bring about the state of affairs contemplated by this amendment. It would have been utterly impossible, had this war been really prosecuted for the maintenance of the Constitution, as our fathers made it, and the restoration of the Union as it was, for the people of this country ever to allow this Union to be dissolved. The patriotic spirits of the North and the South would have risen up and said that the Federal Union should be preserved, and the Federal Constitution maintained. But no sooner are we engaged in civil war, notwithstanding the administration and Congress announced that the object should be simply for the preservation of the Constitution and the restoration of the Union, than an attempt is made on every occasion to change the character of the war, and to elevate the miserable nigger, not only to political rights, but to put him in your army, and to put him in your navy. And while this policy is pursued the Union will never be restored, because you can have no Union without the preservation of the Constitution.

But, sir, I will not detain the Senate with any remarks. I have said enough on this subject in the present Congress. I have a right, however, as a representative of a State which I expect always to remain in this Union, to see the Constitution of my country preserved, and the Union, if possible, restored, and to see that this attempt which is so persistently made for the elevation of the negro to the level of the white man, on all occasions, shall not be accomplished, at least so far as my vote can tend to any such result.

MR. CARLILE. I desire to inquire of the senator from Iowa if negroes constitute a part of the militia of his State. I know they do not constitute a part of the militia of the State in which I live, and I am not aware that they constitute a part of the militia of any State in this Union. The President has the power to call out the militia of the States to suppress insurrection, and he is made commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. As I caught the reading of the amendment, it provides for enrolling, as a part of the militia, the negroes of the country. Now, sir, who constitute the militia is settled by the laws of the several States; * and I hold that the Congress of the United States has no power to determine who shall compose the militia of a State in this Union. That is a subject of State regulation, and the power of the commander-in-chief, the President of the United States, does not extend, under the Constitution, beyond the calling out of the militia of the several States; and the States themselves determine who shall compose that militia. I am not aware of any State of the Union — and I put the inquiry to the senator from Iowa, for the purpose of information — where the negro constitutes a part of the militia of that State; and if he does not, by virtue of the State laws, the Congress of the United States surely has no power, under the Constitution, to determine who shall compose the militia of a State in the Union. I differ with the senator from Delaware. I do not think it is an effort to elevate the negro to an equality with the white man; but the effect of such legislation will be to degrade the white man to the level of the negro. — See *Globe*, p. 3198.

In a discussion which was continued on the 10th of July, Senator Collamer said, respecting the bill (384), "I have not much to say about my

* This is an error in law. See 18 Am. Law Rep. 167, 172; 22 Law Rep. 477. Opinion of William Wirt, Attorney General.

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confidence in colored men making good soldiers. I do not know much about it. I can only say that we did use them in the last war with England," &c.

MR. TEN EYCK moved to strike out the words "any military or naval" before the word "service."

MR. KING replied. We may as well meet this question directly, and see whether we are prepared to use for the defence of our country the powers which God has given to it — the men who are willing to be used to preserve it. I hope the Senate will not strike out these words, which might, by construction, prevent the use of these persons for military purposes. They are now in the navy, serving our guns there; and why should we not be at liberty to use them in the army? It has been said that there is no necessity for the passage of a bill of this kind; that the power exists fully, not only for the general purposes here described, but to enlist them as soldiers, and that it is a matter of discretion. The difficulty is in the prejudice with which a great many minds take up and contemplate this question. For my part, I am prepared to express my opinions upon it. The President, in his message at the beginning of the session, referred much of all these subjects to Congress for its opinion. Congress has heretofore refrained from acting on this point. I should have been prepared to act at a much earlier day, but I think the time has come when we may at least express our opinion. If the senator from New Jersey persists in his motion, I shall want a division on it. I hope he will consent to let the section stand as it is, without pressing his proposition.

MR. TEN EYCK. My proposition is to strike out the words "any military or naval" before "service," so that it will read, "That the President be, and he is hereby, authorized to receive into the service of the United States, for the purpose of constructing intrenchments or performing camp service, or any other labor or service." Without descending to particulars, — "any other labor or service for which they may be found competent, persons of African descent; and such persons shall be enrolled and organized under such regulations," &c.

MR. KING. Our opinions are expressed, and our wishes accomplished, through a great many modes of action and forms of expression. The senator states, as I understaud, that his object is to enlarge the scope of action of these persons who may be thus employed. In my judgment, the direct effect is to strike out these two purposes for which these persons may be employed and used. There are enumerations of service, and, in my opinion, the labor in the intrenchments, the camp service, and the various other services for which they may be employed, ought to be enumerated. I think they should go into the service to relieve our troops from carrying baggage, and a great amount of labor which is imposed on the troops. Our troops should be left free from the performance of these fatiguing impositions of labor, that are necessary in a camp and in marches, wherever it can be done. If that is all these people are wanted for, I am content; but I would also expressly declare that they may be used for "military and naval purposes." That is the question upon which doubts exist, and upon which differences of opinion exist. Nobody would object, probably, to their cooking, and yet but a few of them are used in that way. One of the difficulties in this matter is, that these persons, when they come to our tents and our camps for their own safety and security, — and everybody has a right to look to that, — are now uncertain; and we have had no such general declaration from any department of the government as can give accurate cer-

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tainty to them as to what is to be their future fate. I think it is time we had said to these people, who will take up their arms, or who will take up their shovels and spades and their hoes, or who will buckle the knapsacks of our soldiers on their shoulders, and carry them, that they who will come to do this service shall be free. The time has come to say that, or to say that it shall not be so. Let us be men, and treat these people as men; and let us understand where we are, and what is the decision of this country upon these subjects.

We have, in my judgment, nothing to fear from our enemies on account of the expression of our views on this point. All we have to fear is from timid counsels, that hesitate to pronounce what are really the sentiments and opinions of the country. The justice of God must be sustained by a government and its people, or it cannot stand. What is just and right in this matter? Let us not fear to say it; let us not fear to proclaim it; let us not go behind any form of words, by declaring that this thing is not necessary; that this power exists; that it is already in the power of the President to do this. The President has not done it. I find no fault with him. I make no complaint, and I should not have made this allusion, excepting that it is presented here as an obstacle to an expression of our sentiment on the subject. If the senator from New Jersey persists in this amendment, I regard it as one which, by its very effect and construction, declares it as the judgment of the Senate that these military and naval purposes ought not to be enumerated or mentioned among the purposes for which these persons may be employed. The senator may put "all other services," if he pleases; he may put in any words, enlarging it to his heart's content; but I do not want to restrain it. — *Globe*, p. 3228.

MR. KING. The words, as the senator suggests, were modified by authority of the mover, and not by a vote of the Senate: but that makes no difference. It was a change of the original language from the word "war" to "military or naval."

MR. DOOLITTLE. Of all things I dislike ambiguity in any law passed by Congress. I desire that it shall state clearly what is intended, and no more. As to the employment of either Indians or negroes in the service of the United States, the course pursued by the commanders of the rebel forces against the government of the United States, makes it perfectly justifiable in us to employ them in any capacity for which they are competent, in the progress of this war. They have, beyond all question, employed Indian savages as a part of their armed forces. We should be perfectly justifiable in authorizing the President to employ Indians against the rebels. So, too, in relation to the employment of negroes. We have been informed — and I think we cannot be mistaken — the traitors in arms against us have employed negroes, not only upon intrenchments and in camp service, but have organized and have put arms in their hands, to shoot down our sons and our brothers on the field of battle. Such being the fact, it is justifiable on the part of the government of the United States, by every rule of honorable warfare, to authorize the President, if in his judgment it shall become necessary, to employ them, and even to arm them. . . .

The further power of arming them is in the discretion of the President, where it can be most safely lodged. They were employed to some extent in the revolution, and in the last war with Great Britain. They are employed by the wicked leaders of this rebellion against us now. While I would be the last to sanction a departure from the rules of civilized warfare, we cannot be condemned in our own consciences, nor before the civilized world, if we employ the same class of persons to fight against the rebels which they employ against us, &c.

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The motion to strike out "any military or naval service," was put, July 10, 1862, and negatived. Yeas 11, nays, 27. — *Globe*, p. 3231.

MR. SAULSBURY. As the yeas and nays have been ordered on this question, I wish to say that I shall decline voting on it, although the amendment seems just; but as it recognizes the employment of negroes in the army of the United States, and as I am opposed to the whole principle, I cannot vote for the amendment; neither can I vote for the original proposition. — *Globe*, p. 3232.

MR. GRIMES. The necessity which exists for this provision grows out of the fact that there is no method of paying these persons without the passage of such a law as this; and colored persons who have been enrolled in the military service of the United States, or in some of the collateral branches of the public service, are being disbanded, because of the want of such a provision.

MR. HENDERSON. That is just the difficulty. I do not want these slaves enrolled in the military service. I voted against that proposition. I do not want them taken into the service and used as soldiers at all. I do not believe that they will help you any. That is my opinion about it. I am satisfied that they will not. In the first place, they know nothing of the use of arms; and, in the second place, if you have to wait to instruct negroes in the use of arms, and in the discipline necessary to make good soldiers, before you strike at this rebellion, let me tell you the rebellion is a success. That is all I desire to say in reference to that. As a question of policy, I think the matter is against you; as a question of expediency, I think the matter is against you.

But, sir, there are many things they can do. They can use the spade; they can use the hoe; they can use the pick; and they can drive wagons. For all these matters, except military service, it is perfectly competent now for the quartermaster's department to take them. I say I would use them, and require the quartermaster's department, under the general appropriation bill, to pay for their service and labor, and I am frank to say the loyal slaveholders will sustain me in it. I would use them wherever I could use them to put down the rebellion; not as soldiers, because I believe — I know you differ with me — that they will do you no good. I believe that for every good soldier you would get among them, you will lose a white man, who will be driven off by his prejudices against legislation of this character. I may as well be frank. I may as well tell you what I believe. I think the day has come when it is absolutely essential for men to talk out, and say what they believe and what they know in reference to this thing. These are my opinions. I give them frankly. I am aware that gentlemen do not agree with me.

Now, sir, how many negroes are you going to take? How many do you want? This bill will give you the right to take all the slaves. Suppose the government makes a mistake, and gets the slave of a loyal man. Then, I say the loyal man ought to be paid for the slave. It would be wrong to turn him loose. If it is necessary, go and take the slaves of loyal men, and use them in building fortifications. They have been so used. I know plenty of loyal men in Missouri who have taken their negroes and made them do service in that way in favor of the Union. Shall that make them free? Are you going to legislate them free in consequence of that act? I say, No! It is an institution recognized by State law, and it is not for us to tear down that institution which has been recognized by the people of the State, the only persons properly having jurisdiction over it.

Now, how many do you want? I believe there are nearly four million

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slaves in the country. There are half a million of them in the non-seceding States; perhaps not over four hundred and twenty-five thousand. You can get just as many of them as you want to pay for. You can get ten times as many as you want in the seceding States. You can get all you desire to put into the service under this law; or under the law as I propose to amend it, you may take the slaves of every rebel in my own State. How many do you suppose the adoption of my amendment will exclude you from taking? Some gentlemen say, Why not give us the slaves of loyal men in the border slaveholding States? At the first blush it does look to be a matter of justice; but how much do you get by it? Let me tell you, a loyal man will feel rather badly to have his slave taken by the President of the United States, and put into the army by his side. He may tolerate a great deal better the taking of the slave of the rebel, but he will not like to have his own slave taken from home, when he himself is fighting the battles of the country; and nearly every man in the border slaveholding States is so engaged. They all have to do it once in a while. Nearly all of them have been, or are now, in the service. A loyal man in one of those States will dislike very much to have his slave, whom he left at home attending to his family, brought into the service; and I think the slave himself would like it much more if you would leave him at home, where his master left him, and where, in ninety-nine cases out of a hundred, he would be better off than if you enlisted him and took him away. That is my opinion, and hence it is that I propose this amendment; and I hope it may be adopted. By rejecting my amendment you will not get one hundred slaves, including the old and infirm, children, and everybody else. You have as many slaves as you want; you have as many persons of color as you desire throughout the broad expanse of these seceding States. — *Globe*, 3232.

Mr. Lane, of Kansas. I can imagine a case like this, and I think we shall find thousands of them, at the close of this rebellion, under this law, believing that it will pass. A slave is enlisted in the service of his country; he fights bravely and gallantly, and I believe as bravely, as gallantly, and as skilfully, as the white man; and I take this occasion to say, that the statement of the senator from Missouri, that the slaves of Missouri are not used to the gun, is a mistake, to say the least of it. The slaves that I saw in Missouri were skilful in the use of the gun, and I had twelve hundred of them at one time within my brigade. But to continue my illustration: after this war is over, a soldier, perhaps covered with scars, his mother, wife, and children around him, — having escaped, or their masters escaped from them, — are in Washington city. I say that the government that would restore that mother, that wife, and those children to slavery, after that father and husband has been covered with wounds in defence of the country, deserves to be damned. I deny that this government cannot take the slaves of the loyal and the disloyal, and that they are estopped from making any use of them that they choose for the suppression of this rebellion; and having made use of them, I say it would be a crime before God to return them to slavery. — *Globe*, p. 3235.

Mr. Hale. I would a great deal rather meet that form of question by paying the loyal owner of slaves, or the loyal person who claims to be their owner, compensation for those that might be freed under the operation of this act, than to put in such an amendment as that. I cannot imagine a human being (and there are some people fanatical enough to believe that colored men are human beings) in a worse situation than you would put him in by the operation of this bill, thus amended. You put him into your Federal army, and rely upon his aid for success; and if he thinks at all, he must think that his success will be the perpetual enslavement of his wife and children. — *Globe*, 3249.

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MR. COWAN. I think the method proposed by the senator from New Hampshire would be a very expensive way of "procuring soldiers." It appears, according to his plan, that when a negro slave enters your army, either as a laborer or as a soldier, immediately on his performing service, his wife, his mother, and his children are entitled to their freedom; and if they belong to loyal people, the government will pay for them. Now let us see at what cost we should achieve the service of one negro on this plan. He may have a mother; what is she worth? That is the question. Put her down at five hundred dollars, if you please. He has a wife; what is she worth? Put her down at five hundred dollars. He has children; what are they worth? That will depend upon the number he has, and their ages and their value. But without counting the children, here is one thousand dollars to be paid as a bounty over and above, to "get a negro soldier into the American army." — *Globe*, p. 3249.

. . . . . .

If the President has refused to adopt the counsels of certain people in regard to arming the slaves, and all this kind of thing, and they want to compel him into that course, and to compel him through the channels of legislation, I would write it down. I would approach him at least as a man, and I would not undertake to do it under cover of this kind of law. — *Globe*, p. 3250.

MR. HOWE. . . . The senator from Pennsylvania says, if it is desirable to have the black population in the service of the United States at all, the States organize their own militia, and they may be called into the service by the action of the States themselves. Now, sir, we all know that the militia of the States do not comprise in their organization the blacks of the country. It is the white population alone, so far as I know, in any State of the Union, who are organized as militia. I am not aware of a single State in which the black population are organized in the militia. — *Globe*, p. 3251.

MR. COWAN. Then my friend will allow me to ask him if they are not in the militia, as the militia comes from the States when we call upon it, where are these people to go except into the regular army? And I wish to follow that by this further question, whether there is any restriction now on the Executive to put them in the regular army? — *Globe*, p. 3251.

MR. KING. The senator's inquiry shows that he is not aware of any mode in which we can get service from these people without some action of law. It is for that very reason that there is not sufficient provision of law to enable the astute and excellent lawyer from Pennsylvania to determine how these persons shall be got into the service that he asks me the question, because he does not know himself. This bill provides for bringing this black population into the service of the United States, — not as the militia, not as the regular army, but it provides a special mode in which they shall come in; and it is because of the peculiar condition of the country at this time that there is, in my judgment, a special propriety in calling them into the service. Mr. President, the mangled corpses of thousands of our young men sunk in the marshes of the Chickahominy and other localities in the Southern States, cry to us for some mode by which those who are to come after them shall be relieved from the diseases and death which have fallen upon them in the defence of their country. Do we not know — is there a question about it in the mind of any man — that the pestilential atmosphere of these low grounds and marshes is more dangerous to our men than the bullets and bayonets of the enemy? In my judgment, there is no danger to this country from bullets and bayonets. These infamous insurgent enemies who are now attempting to destroy the Constitution and the country, rely upon the climatic influences as a means of security. . . .

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But it is not to call the black population from the free States that this bill is to provide, or is necessary. We find in the insurgent States thousands and tens of thousands of willing, strong, hardy men, anxious to serve this country, and to do what is more dangerous for our men than to fight, — to dig in the trenches, to do the labor of our army. Should we refuse to have that done upon some question and quibble of authority or of law, or of who may exercise this power? I trust not. The whole scope and object of this provision is to enable us to bring these people into the service, and to relieve the country, the army, and us all from this kind of doubt and difficulty that the senator from Pennsylvania himself has suggested, as to how this thing can be done. This bill provides how it shall be done.

Mr. President, shall we bring these people, in this condition of things in the country, into the public service, and not guarantee to them their liberty? Why, sir, we should hardly deserve their services, if after they had preserved our rights and our liberties we could return them into slavery. It would be unworthy a Christian or a pagan people to do so. Let us meet this question fairly and frankly, and say to those who shall come to our aid, that they shall have the benefits which the shedding of their own blood secures to us, and that it shall secure the same to them. It was so in the revolution. Let us meet this question like men. If the Senate or the country is prepared to say that we will not have these services, let that be said, though it is much against my opinion, but let us understand this matter. Let us know, and let our young men know, when we are calling upon them to come into the service, whether we are willing to respond and give them every aid in our power when we call upon them to come and meet the double dangers of disease and battle. I say it is our highest duty to provide every means in our power to protect them in their health and in their comfort, as well as in their lives; and, in my judgment, this bill is most essential and desirable for the safety and security of the country.

. . . . .

Now, the question arises in the case of the negro, Can you put him into your army? Can you drill him and discipline him so as to make him respect the laws of civilized warfare, as our people do, as white people do? Will he, in the hour of victory, be clement? Will he give quarter when quarter is demanded? Will he make war upon women or children, or will he make war only upon combatants? These are the questions. Then, the next difficulty which occurs is, Who shall decide that question? In whose hands is it to be decided? Is it to be decided by the Congress of the United States? I say emphatically, No. I say, this Congress to-day is incapable of deciding the question. I say, my honorable friend from New York, or myself either, knows nothing at all about it. If we were generals in the field, if these people were brought before us, if we were to inspect them and try them for a time, then we might decide it. It is a question of fact, which the legislation of no country, I think, can determine. Therefore it is a question that devolves on the Executive to determine.

MR. RICE. During the revolutionary war, the legislature of Rhode Island authorized the enlistment of negroes and Indians.

MR. COWAN. That may all be. I have nothing to say against that. The legislature of Rhode Island may have done a great many things, and done them very properly. I do not undertake to say they have not; but I do undertake to say, when the question comes up in this country, it is a question of fact to be determined by the executive branch of the government, and not by the legislative branch of this government. If the President and his generals are of opinion that he can take these men, enlist them in our armies, regulate them, subject them to the rules of discipline as our

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own people are, then I have said here openly, that he should do it; but as I do not know whether he can or not, and it is for him to decide, under the Constitution, I will leave that question to him. — *Globe*, p. 3251.

MR. GRIMES. Is it not the law of the United States which declares that they shall be white?

MR. COWAN. No, sir, it is not. I do not know of anything in the Constitution of the United States that requires the militia to be white.

MR. SUMNER. That is the law of Congress.

MR. GRIMES. The laws of the States in relation to the militia are made in pursuance of the law of Congress, which declares that the militia shall be composed of white persons.

MR. COWAN. Not necessarily so at all. Each State, in its own separate individual capacity, has a right to organize its own militia, beyond all question, and they have done so repeatedly all over the country; and when so organized under the State laws, the general government has a right to call upon them, and they have the right to send them, and to send them with men, officers, and equipage.

MR. SUMNER. If the senator will allow me, I will read to him one sentence from the statute of 1792, on the organization of the militia. It is as follows: —

"Each and every free able-bodied white male citizen of the respective States resident therein, who is or shall be of the age of eighteen years and under the age of forty-five years, except as hereinafter excepted, shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company within whose bounds such citizen shall reside, and that within twelve months after the passage of this act."

That is the foundation of the military system of the United States.

MR. COLLAMER. If the gentlemen will allow me a moment on this point about the organization of the militia, I wish to read what the Constitution says about it. Among the powers of Congress is the following: —

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

Congress, under this authority of the Constitution, passed the law to which the senator from Massachusetts has referred. The organization of the militia is not left to the States. It is an organization, under the Constitution, by act of Congress. — *Globe*, p. 3252.

MR. COWAN. The volunteers, then, that are called from the States, are the militia of the States, and come with their own organizations and their own officers. The senator from New York said this law provided for that; but I ask, is this law intended to provide for the organization of negroes into the militia of the several States? Is that the object?

MR. KING. I will read the clause. It says they are to be employed "in the service of the United States. They are to dig trenches and fight the rebels. They are to be organized, fed, and paid for to do that work."

MR. COWAN. If that is all, then we are left just about as wise as at the start.

MR. KING. I thought so.

MR. COWAN. The law, then, provides for nothing. It provides that they may be taken into the service of the United States.

MR. KING. If the senator will allow me, it provides for a good deal, and precisely what I desire this bill should do, — that they may dig our trenches, perform labor in the camps, and fight the enemies of the Union, the insurgents and rebels. — *Globe*, p. 3252.

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MR. COWAN. . . . Because you do not agree as to how the army shall be organized, you do not want the army to be effective! It is a non sequitur, and nobody, I should think, except an orator in some country debating school, would ever think of resorting to it as a means to foil an antagonist. I want the army to be made effective, just as much effective as anybody, and I say I never heard any objection on the part of anybody, that slaves should dig our intrenchments and do the work they can do in the camp. I never heard anybody object to that, but there is an objection to making soldiers of them. — *Globe*, p. 3252.

MR. COWAN. . . . But, as I said before, that is not the question. The question is, whether we will employ negroes in our armies, and in our regular army, because I know you can place them nowhere else, unless you make a new law specifically authorizing the militia to be composed of them, which I think would be exceedingly mischievous. If you alter your law so as to put the negroes of the free States in the militia of those States, you will not get a white man to come here. I do not think you will get a man from the free States to come in a company here if negroes are to come along with him in that same company; and these men love their country, and are just as willing to do as much for it as we are now. Then, I say, unless you alter that law so as to authorize them to be put in the militia, there is nowhere else they can be put except in the regular army; and to that there is now no impediment by any law of this republic. The President has full and entire authority over that subject. When a negro comes up to enlist, there is the same right to strip and examine him, and determine whether he shall be put into that company through the medium of his recruiting officers, as there is to enlist a free white citizen. Whether the President would permit this is another thing, but it is with him in the exercise of his judgment. He must decide it, because it presents the question of a race in that attitude to other civilized races, for we cannot determine it. I therefore propose to intrust it to him. He is as anxious as we are, of course, to suppress this rebellion — perhaps more so. He has more cares in regard to it than we have. I have the greatest confidence in his wisdom, his prudence, his moderation, and his desire to do it with an eye to the restoration of the Union. — *Globe*, p. 3253.

MR. WILKINSON. It seems to me like madness to refuse or to undertake to reject this offer because we cannot find a place where to put these men on the statutes, whether we regard them as militia men or regular army men. Put them into the ranks. General Washington found no difficulty on that point. — *Globe*, p. 3254.

MR. DAVIS. The particular and interesting question before the Senate is this: Shall the President of the United States be authorized by this bill to arm the negro slaves of the United States? — *Globe*, p. 3255.

MR. DAVIS. The honorable senator from Iowa (Mr. Harlan) in the beginning of his speech gave a clear, concise, and able résumé of the events of this war of rebellion, and an equally clear statement of its present condition. He showed that everywhere the rebellion was yielding, and how certainly the arms of the United States were overcoming and would certainly crush it out. That portion of his argument conclusively demonstrates this measure of arming the slaves to be wholly unnecessary, and that if it is done it will only be for the purpose of bloody, cruel, and shocking vengeance against the seceding States, and in utter recklessness of the great misery it will bring down upon the Union people of the border States. — *Globe*, p. 3257.

MR. WILSON, of Massachusetts, from the committee on military affairs and the militia, reported a bill (S., No. 394) to amend the act calling forth

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the militia to execute the laws of the Union, suppress insurrections, and repel invasions, approved February 28, 1795, and the acts amendatory thereof, and for other purposes; which was read twice by its title and ordered to be printed. — *Globe*, p. 3289.

A proposal had been made as follows: "And they shall be fed and clothed, and paid such compensation for their services as they may agree to receive when enrolled."

It was moved, July 14, to strike out this clause, and the payment to be ten dollars per month, three dollars of which monthly pay may be in clothing. This was adopted.

July 15 the discussion continued, it being upon the question of giving freedom to those who had been in the service.

MR. LANE, of Kansas. I desire now to make a statement to the senator from Ohio. He was not in when I was up before. There is a practical difficulty in adopting the amendment he has offered if we propose to use the slaves. We propose to use them in fighting. We have in Kansas, as reported to me, six thousand four hundred slaves. Out of this number we expect to get two regiments of infantry. A large portion of these slaves belong to loyal masters. I undertake to say that one third of these slaves belong to loyal masters. The idea of organizing these men into regiments, inducing them to fight for the country and against its enemies bravely, as I believe they will fight, and after they have rendered the service, returning them to slavery, is to me an outrage that the senator from Ohio would not in any wise indorse. After they have fought bravely for freedom, for the maintenance of the government, to return them to slavery is monstrous. By the proposition that I make, the loyal citizen is not wronged. We use the slave, and we free him as did our fathers in the revolution, and as they did in the war of 1812, and if the masters are loyal we will remunerate them for the loss of the slaves. No incentive can be offered to men that will induce them to fight more desperately than their freedom. You say to them that they are to return to slavery after the war is over, and there is no incentive for them to fight. If you propose to use these negroes as soldiers, the proposition of the senator from Ohio destroys the probability of making them useful as soldiers. Slaves of loyal and disloyal masters come away together; they cannot be separated; and you throw in among regiments men who have no incentive to fight, but the contrary. It seems to me that the government which will return to slavery a man who has fought for its defence deserves the frowns of the Almighty. — *Globe*, p. 3337.

MR. HOWARD. . . . It seems to me that if I were a slaveholder, I could not bear the idea of employing or suffering my slaves to be employed in defending me and my rights as a loyal man, taking arms in their hands and going with me into the face of the battle, and risking their lives to defend my life, and my family, and my rights under my government, and afterwards reducing those poor creatures to slavery. . . .

MR. HARLAN. I do not think an individual, a slave that may have been armed and mustered into the service of the United States, will ever again be fit for slavery. I think that is the history of the whole world on this subject. I do not remember a single example, since civilization commenced, when slaves have been mustered into the armed service of a country, and again attempted to be returned to slavery. . . . — *Globe*, p. 3339.

MR. HARLAN. We propose to enlist these colored men, and put them in

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the trenches to dig ditches and erect fortifications; and when found necessary, and when the parties are found competent, to arm them in the defence of the country. — See *Supplement to Globe* (July 11, 1862), p. 313.

These debates resulted in the passage of the act of July 17, 1862 (Chap. 201) (See No. 394), and was entitled "An Act to amend the act calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion (approved February 28, 1795), and the acts amendatory thereof, and for other purposes." Is it possible that any one could read the extracts above quoted from the speeches of so many eminent senators, every one of whom argued for or against this proposed law on the ground that it was for the *express purpose of making soldiers* out of slaves and persons of color, and then deny or doubt that the act was intended for that purpose? Yet Attorney General Bates, in his argument in favor of the claim of negro soldiers to pay and rations equal to white soldiers, has expressed the opinion that this law *was not intended* to authorize the employment of persons of African descent as soldiers! It is doubted whether there was a single member of the House or of the Senate who did not know the contrary. The debates in Congress during the session of 1861–2, which terminated on the 17th of July, 1862, prove beyond question, —

1. That it was fully understood by members of both Houses that colored persons and slaves then constituted by law no part of the military forces of the United States.

2. That no provision of law then existed which would authorize the arming of colored men or slaves as part of the volunteer force of the United States.

3. That from May to July, 1862, several attempts were made, which failed, to introduce colored men into the military service on an equality with white soldiers.

4. That in passing the act of 1862 (Chap. 195), the confiscation act, it was not the intention of Congress to introduce negroes or slaves into the volunteer forces, or the regular army of the United States, but to give them employment in camps, forts, &c., in *hot climates*, where such labor was too oppressive for northern troops.

5. That the act of July 17, 1862 (Chap. 201) was expressly and avowedly intended to empower the President to make colored troops, whether slave or free, a part of the volunteer forces of the United States, to be organized, armed, and equipped accordingly, and that the payment provided *in the act*, and the *freedom* secured to those who were thus enrolled, were intended to cover not ordinary labor only, but the military services to be performed by them *as soldiers* and as *fighting men in the field.*

6. That whenever colored volunteers entered the *military service* after the passage of the act (Chap. 201), it was the meaning and intent of the law that they should be *organized* and paid *under that act.*

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7. That it was not the intention of the legislature to place negroes in the military service of the United States upon an equality of pay with white volunteers at the time when these acts were passed (1862).

The construction put upon this act by the Senate is shown by a subsequent debate. "The employment of negroes as soldiers was subjected to a vigorous discussion, started on the 27th of January, 1863, by an amendment offered to a pending bill by Mr. Stevens, directing the President to raise, arm, and equip as many volunteers of African descent as he might deem useful," &c. The border States opposed it. Crittenden objected. Sedgwick, of New York, advocated it. It passed the House by 83 ayes to 54 noes. On reaching the Senate, it was referred to the committee on military affairs, which, on the 12th of February, reported against it, on the ground that the authority which it was intended to confer upon the President was already sufficiently granted in the act of the previous session (approved July 17, 1862), which authorized the President to employ in "any military or naval service for which they might be found competent, persons of African descent." This report shows conclusively that the Senate construed the militia act of July 17, 1862 (Chap. 201), as fully authorizing the President to raise, arm, and equip as many volunteers of African descent as he might deem useful; but no senator claimed that the *confiscation* act of July 17, 1862 (Chap. 195), contained such an authority.

The Enrolment Act of 1863.

The next act under which it has been supposed that colored men and slaves may have been received into the military service, is the act approved March 3, 1863, called the Enrolment Act, which provided "that all able-bodied male *citizens of the United States* [and certain aliens] should constitute the national forces, and be liable to perform military duty when called out by the President for that purpose." The question whether colored men and slaves were included in *this act*, depends upon the answer to the question, whether they were at *that date* deemed in law to be citizens of the United States. The previous act of 1862 included all citizens and persons of African descent, but does not say whether citizens referred to were required to be citizens of the United States, or only of States. For the purpose of interpreting the legal meaning of the phrase "a citizen of the United States" as used in the law of 1863, it is necessary to refer to the decision of the Supreme Court of the United States, in force and still unreversed at the time of its passage, in the case of Dred Scott. By that decision, however jurists may now differ in their views of the matters discussed, it was decided that Dred Scott was not deemed in law to be a citizen of the United States, because he was a person of African descent; and if the construction of this enrolment act were to have been submitted to

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the same court, unless they should reverse their former decision, they would at that time have pronounced the opinion that persons of African descent, and especially slaves, were not included within the terms of the act.* If colored men were intended to be included therein, and were required to be enrolled as part of the forces of the United States, and to be paid like other soldiers, is it not singular that Congress should have passed another act, approved on the same day (March 3, 1863), "for promoting the efficiency of the corps of engineers and ordnance department," in which a provision was made that the cooks should be detailed from the privates, and the *President was authorized* (Sect. 9) "to cause to *be enlisted* for each cook, two *under cooks*, of African descent, who should receive, as their full compensation, ten dollars per month and one ration per day, three dollars of which monthly pay may be in clothing" (being the same compensation as under the militia act of July 17, 1862)? If these colored cooks were liable to be enrolled under the act of March 3, and were entitled to be paid, when enlisted, the same as white soldiers (who also were detailed as cooks), it would seem strange and inconsistent to have persons of the same color and grade, and performing the same service, in different corps of the army, so unequally treated as to payment, bounties, pensions, &c. It is not reasonable to suppose that Congress intended that colored men if enrolled in the military forces should be paid thirteen dollars per month, and if enlisted in the Engineer Corps should be paid ten dollars per month, performing the same duty in both cases. It is questionable whether colored men or slaves, as they were held by the Supreme Court not to be citizens of the United States, were included within the strict terms of this statute.

The Amended Enrolment Act of 1864.

The act of February 24, 1864, however, defines and settles the status of colored men and slaves, by providing, in express terms, that

"All able-bodied male colored persons between twenty and forty-five, resident in the United States, shall be enrolled according to the provisions of this act, and of the act of March 3, 1863, and form part of the national forces."

If they had formed part of the national forces, or had been required, by the law of 1863, to be enrolled, it is difficult to see why this amendment or additional provision was necessary. This act avoids the question of citizenship of colored men. It is not material whether persons to be enrolled under this statute are citizens of either of the States, or citizens of the United States (as required by the act of 1863). Whether slave or free, whether citizens or not, if residents only, they were required to be enrolled, and they were to be assigned, not as State troops, but were to be mustered into service in regiments or companies as United States colored troops.

* See Opinion, p. 371.

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This statute (Sect. 1) permitted the President to enroll (under restrictions) in the militia of the States all able-bodied male citizens. Beyond this, he was permitted by express provision also to enroll persons of African descent for military service. If persons of African descent were deemed to be a part of the militia of the States, why was it necessary to add a separate clause giving express power also to enroll them, and to make them soldiers? As the law of 1795 was in force at the time when the act of 1862 was passed, and as colored men and slaves were no part of the militia of any State, and were, therefore, not included in the provisions of the first section, above cited, it became necessary either to enact the twelfth section, giving express power to the President to employ this class of persons as soldiers, or else to repeal the act of 1795. Congress adopted the former alternative, and passed a statute which called into service both slaves and free men of African descent. The question may also be asked, with equal force, if any law of Congress authorized the enlistment of slaves or of colored persons, prior to 1862, what was the use of amending the law of 1863, for enrolling the forces of the United States by providing in the act of February, 1864, "that all able-bodied male colored persons between the ages of twenty and forty-five years shall be enrolled according to the provisions of this act, and of the act to which this is an amendment, and form part of the national forces? What was the use of all the provisions for the volunteering and draft of slaves? If colored persons were included in the forces of the United States under previous laws, why was the distinction between them and ordinary troops constantly repeated in every statute? If it was the intention of Congress, when passing any of the acts authorizing the calling out of volunteers prior to 1862, to place slaves and persons of African descent, in the military service, on an equality with white soldiers, why was not that intention plainly expressed in some of the acts they passed, and why did not Congress repeal those previous laws and army regulations which prevented such intention from being carried into effect? If Congress really intended to give colored soldiers equal pay with white soldiers, why did it spend so many days in discussion whether to give them pay for the future according to such intention? Why has it refused to pass any law which shall put at rest all questions on this subject, by giving the colored troops back pay from the beginning of their service? The inference from these considerations is irresistible, that Congress had no intention, in 1862, to allow negroes and slaves as volunteers in our army, nor to place them at that time on an equality with white soldiers, and never meant to express, and never did express, such intention until 1864. The plain truth is, that from 1792 there has been a distinction made in the laws between white and colored men, the latter having been excluded most of the time by regulations having the force of law from the regular army, and all the time from the State militia when organized accord-

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ing to law. The act of July 17, 1862 (Chap. 201), was an experiment for the purpose of enabling the President to test the capacity of negroes to become reliable soldiers. The experiment has succeeded. The act of 1864 has made them permanently a part of the national forces. It is gratifying that Congress has at last equalized the pay of all soldiers of the country.

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APPENDIX:

CONTAINING

CASES DECIDED BY THE U. S. COURTS

ON THE SUBJECTS TREATED OF IN THE FOREGOING PAGES.

FLEMING *vs.* PAGE, 9 Howard's S. C. Rep. 614.

Mr. Chief-Justice TANEY delivered the opinion of the Court:

The question certified by the Circuit Court turns upon the construction of the Act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port, within the meaning of the Act of Congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

Tampico was subject to the sovereignty and dominion of the U. S.

Tampico was *governed* by our military authorities.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly, at the time of the shipment, *subject to the sovereignty and dominion of the United States.* The Mexican authorities had been driven out, or had submitted to our army and navy, and the country was in the exclusive and firm possession of the United States, *and governed by its military authorities, acting under the orders of the President.* But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the Acts of Congress.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general gov-

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ernment to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest, or the acquisition of territory: nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. *As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States.* But his conquests do not enlarge the boundaries of this Union, *nor extend the operation of our institutions and laws beyond the limits before assigned to them* by the legislative power.

Powers of the President as Commander-in-Chief to govern the army and employ it, — to invade, to subjugate, not to extend the limits of Union.

It is true that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

Tampico *ours*, — as against foreign countries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms, did not depend upon the laws of nations, but upon our own Constitution and Acts of Congress. The power of the President, under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not their own: the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and

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be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign, nor did our laws extend over it. Tampico was therefore a foreign port when this shipment was made.

Again, there was no Act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The *person who acted in the character of collector* in this instance, acted as *such under the authority of the military commander, and in obedience to his orders; and the duties he exacted and the regulations he adopted were not those prescribed by law, but by the President in his character of commander-in-chief.* The custom-house was established in an enemy's country, *as one of the weapons of war.* It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, *but as a measure of hostility, and as a part of the military operations in Mexico;* it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than *contributions levied* upon the enemy, which *the usages of war justify when an army is operating in the enemy's country.* The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States as the documents required by the Acts of Congress, when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

Collection of duties by military authority.

An act of hostility.

Contributions may be levied.

This construction of the revenue laws has been uniformly given by the Administrative Department of the government in all cases that have come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an Act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that, although Florida had by cession actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic by an Act of Congress, and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the Government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island and certain ports in Louisiana after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other set-

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tlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department, in no instance that we are aware of, since the establishment of the Government, has ever recognized a place in a newly-acquired country as a domestic port from which the coasting trade might be carried on, unless it had been previously made so by Act of Congress.

The principle thus adopted and acted upon by the Executive Department of the government has been sanctioned by the decisions in this Court and the Circuit Courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one unless the custom-house from which the vessel clears is within a collection district established by Act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

In the view we have taken of the question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, *neither claimed nor exercised* any rights or powers in relation to the territory in question, *but the rights of war.* After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the Government are brought into question. Our own Constitution and form of government must be our only guide. And we are entirely satisfied that under the Constitution and laws of the United States Tampico was a foreign port, within the meaning of the Act of 1846, when these goods were shipped, and that the cargoes were

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liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.

CROSS *vs.* HARRISON, 16 Howard's S. C. Rep. 189.

"Indeed, from the letter of the then Secretary of State, and from that of the Secretary of the Treasury, we cannot doubt that the *action of the Military Governor of California was recognized as allowable and lawful* by Mr. Polk and his cabinet. We think it was a rightful and correct recognition under all the circumstances, and when we say rightful, *we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import* duties to the ports of California.

Constitution authorized acts of military government in collecting revenue.

California, or the port of San Francisco, had been captured by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all of Upper California. Early in 1847, the *President, as constitutional Commander-in-Chief of the army and navy*, authorized the military and naval commander of our forces in California *to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country*, and to *impose duties* on imports and tonnage as *military contributions* for the support of the government and of the army which had the conquest in possession. We will add, by way of note, to this opinion, references to all of the correspondence of the government upon this subject; now only referring to the letter of the Secretary of War to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage, which had been prepared by the Secretary of the Treasury, with forms of entry and permits for landing goods, all of which was reported by the Secretary to the President on the 30th of March, 1847. Senate Doc. No. 1, 1st Sess., 30th Congress, 1847, pp. 567, 583. *No one can doubt that these orders of the President, and the action of our army and navy commander in California in conformity with them, were according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace.* . . . . . .

Belligerent right of the President to institute military and civil government over California.

No doubt of authority.

"The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded in fact to the United States, but it was a conquered territory within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them."

But *after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory.* Our inquiry here is to be whether or not the cession gave any right to the plaintiffs to have the duties restored to them which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our Government to the Military Governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation *from the President that the civil and military government, which had been instituted during the war*, was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington. . . . . .

After *treaty* California became *part of the U. S.*, a ceded conquered territory.

Civil and military government during the war instituted by the President.

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The ratification of the treaty of peace was proclaimed in California by Colonel Mason, on the 7th of August, 1848. Up to this time, it must be remembered that Captain Folsom, of the Quartermaster's Department of the Army, had been the *collector of duties under the war tariff.* On the 9th of August he was informed by Lieut. Halleck, of the Engineer Corps, who was the Secretary of State of the Civil Government of California, that he would be relieved as soon as a suitable citizen could be found for his successor. He was also told that "the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariff of the United States will be substituted in its place." The view taken by Governor Mason of his position has been given in our statement. The result was to continue the existing government, as he had not received from Washington definite instructions in reference to the existing state of things in California.

His position was unlike anything that had preceded it in the history of our country. The view taken of it by himself has been given in the statement in the beginning of this opinion. It was not without its difficulties both as regards the principle upon which he should act, and the actual state of affairs in California. He knew that the Mexican inhabitants of it had been remitted by the treaty of peace to those municipal laws and usages which prevailed among them before the territory had been ceded to the United States, but that a state of things and population had grown up during the war, and after the treaty of peace, which made some other authority necessary to maintain the rights of the ceded inhabitants and of immigrants, from misrule and violence. He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly, and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The *territory had been ceded as a conquest*, and *was to be preserved and governed as such* until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union with only such limitations as are expressed in the section in which this power is given. *The government* of which Colonel Mason was the executive, *had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army* and navy officers who administered it, but he did not do so. *Congress could have put an end to it, but that was not done.* The right inference from the inaction of both is, that it was meant to *be continued until it had been legislatively changed.* No presumption of a contrary intention can be made. Whatever may have been the causes of the delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government which was subsequently recognized by Congress under its power to admit new States into the Union.

Origin of this government; How instituted. It did not cease by restoration of peace; Dissolved by power of President, or by Congress.

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Civil government established as a war right.

In confirmation of what has been said in respect to the power of Congress over this territory, *and the continuance of the civil government established as a war right*, until Congress acted upon the subject, we refer to two of *the decisions of this Court*, in one of which it is said, in respect to the treaty by which Florida was ceded to the United States, "This treaty is the law of the land, and admits the inhabitants of Florida to the *enjoyment of the privileges, rights, and immunities of the citizens of the United States.* It is unnecessary to inquire whether this is not their condition independently of stipulations. *They do not, however, participate in political power,— they do not share in the government until Florida shall become a State.* In the mean time Florida continues to be a territory of the United States, guarded by virtue of that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. *Perhaps the power of governing a territory belonging to the United States, which has not by becoming a State acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States.* The right to govern may be the natural consequences of the right to acquire territory." American Insurance Company *vs.* Canter, 1 Peters, 542, 543. (See also U. S. *vs.* Gratiot, 14 Peters, 526.) . . . . . .

Rights of citizenship not necessarily accompanied by *political* power.

Power of governing a territory — how it results.

When military government in California *ceased.*

"Our conclusion, from what has been said, is, that the *civil government* of California, *organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty, or from its ratification.* We think it *was continued over a ceded conquest, without any violation of the Constitution or laws of the United States*, and that, until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason." . . . . .

What laws are in force after conquest.

Right of the conqueror to regulate trade.

"The second objection states a proposition larger than the case admits, and more so than the principle is, which secures to the inhabitants of a ceded conquest the enjoyment of what had been their laws before, until they have been changed by the new sovereignty to which it has been transferred. In this case, *foreign trade had been changed in virtue of a belligerent right, before the territory was ceded as a conquest*, and after that had been done by a treaty of peace, the *inhabitants were not remitted to those* regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another, whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed. We have said, in a previous part of this opinion, that the sovereignty of a nation regulated trade with foreign nations, and that *none could be carried on except as the sovereignty permits it to be done.* In our situation, that sovereignty is the constitutional delegation to Congress of the power 'to regulate commerce with foreign nations and among the several States, and with the Indian tribes.'" . . . . . .

"But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considerations would bring us to the same results. The plaintiffs carried these goods

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voluntarily into California, knowing the state of things there. They knew that there was an existing civil government, instituted by the authority of the President as commander-in-chief of the army and naval forces of the United States, by the right of conquest; that it had not ceased when these first importations were made; that it was afterwards continued, and rightfully, as we have said, until California became a State, that they were not coerced to land their goods, however they may have been to pay duties upon them; that such duties were demanded by those who claimed the right to represent the United States (who did so, in fact, with most commendable integrity and intelligence); that the money collected has been faithfully accounted for, and the unspent residue of it received into the treasury of the United States; and that the Congress has by two acts adopted and ratified all the acts of the government established in California upon the conquest of that territory, relative to the collection of imposts and tonnage, from the commencement of the late war with Mexico to the 12th November, 1849, expressly including in such adoption the moneys raised and expended during that period for the support of the actual government of California after the ratification of the treaty of peace with Mexico. This adoption sanctions what the defendant did. It does more; it affirms that he had legal authority for his acts. It coincides with the views which we have expressed in respect to the legal liability of the plaintiff for the duties paid by them, and the authority of the defendant to receive them as Collector of the port of San Francisco."

JECKER *vs.* MONTGOMERY, 18 Howard's S. C. Rep. 112.

All citizens of States at war are *enemies* of each other.

"As a principle applicable to the first of these inquiries, it may be averred as a part of the law of nations, — forming a part, too, of the municipal jurisprudence of every country, — "that in a state of war between two nations, declared by the authority in whom the municipal constitution vests the power of making war, *the two nations and all their citizens or subjects are enemies to each other.*" The consequence of this state of hostility is, that *all intercourse and communication* between them is *unlawful*. *Vide* Wheaton on Maritime Captures, ch. 7, p. 209, quoting from Bynkershoeck this passage: 'Ex natura belli commercia inter hostes cessare, non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli, commercia inter hostes esse vetita, ipsæ indictiones bellorum satis declarant.' . . . . . .

"The same rule has been adopted, with equal strictness, by this court. In the case of The Rapid, reported in 8 Cranch, 155, the claimant, *a citizen* of the *United States*, had *purchased goods* in *the enemy's country, a long time before the declaration of war*, and had deposited them on an island, near the boundary line between the two countries. Upon the breaking out of hostilities, his agent had hired the vessel to proceed to the place of deposit, and bring away these goods. Upon her return, the vessel was captured, and with the cargo was condemned as prize of war for trading with the enemy. In applying the law to this state of facts, this Court said, and said unanimously, "That the *universal* sense of nations has acknowledged the *demoralizing effects that would result from the ad-*

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All are enemies.

mission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country. But, after deciding what is the duty of the citizen, the question occurs, What is the consequence of a breach of that duty? The law of prize is a part of the law of nations. In it, a *hostile character is attached to trade, independently of the character of the trader*, who pursues or directs it. *Condemnation to the use of the captor*, is *equally the fate of the property of the belligerent, and of the property engaged in anti-neutral trade. But a citizen or an ally* may be engaged in a *hostile trade*, and thereby *involve his property in the fate of those in whose cause he embarks.*"

Non-intercourse.

Again the Court say, "If, by *trading*, in prize law was meant that signification of the term which consists in *negotiation or contract*, this *case would not come under the penalties of the rule. But the object and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent nations. Negotiation or contract has, therefore, no necessary connection with the offence. Intercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed.*" . .

Enemy property.

"The same course of decision which has established that *property of a subject or citizen taken trading with the enemy is forfeited*, has decided also that it is *forfeited as prize.* The ground of the forfeiture is, *that it is taken adhering to the enemy, and therefore the proprietor is pro hac vice to be considered an enemy. Vide* also Wheaton on Captures, p. 219; and 1 C. Robinson, 219, the case of The Nelly."

Attempts have been made to evade the rule of public law, by the interposition of a neutral port between the shipment from the belligerent port and their ultimate destination in the enemy's country; but in all such cases the goods have been condemned as having been taken in a course of commerce rendering them liable to confiscation; and it has been ruled that, *without license from government, no communication, direct or indirect, can be carried on with the enemy;* that the interposition of a prior port makes no difference; that all the trade with the enemy is illegal, and the circumstance that the goods are to go first to a neutral port will not make it lawful. 3 C. Robinson, 22, The Indian Chief; and 4 C. Robinson, 79, The Jonge Pieter. . . . . .

Non intercourse.

Trade unlawful.

DYNES *vs.* HOOVER, 20 Howard's S. C. Rep. 78.

The demurrer admits that the court martial was lawfully organized; that the crime charged was one forbidden by law; that the court had jurisdiction of the charge as it was made; that a trial took place before the court upon the charge, and the defendant's plea of not guilty; and that, upon the evidence in the case, the court found Dynes guilty of an attempt to desert, and sentenced him to be punished, as has already been stated; that the sentence of the court was approved by the Secretary; and that, by his direction, Dynes was brought to Washington; and that the defendant was marshal for the District of Columbia; and that in receiving Dynes, and committing him to the keeper of the penitentiary, he obeyed the orders of the President of the United States, in execution of the

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sentence. Among the powers conferred upon Congress, by the 8th section of the 1st Article of the Constitution, are the following: "to provide and maintain a navy;" "to make rules for the government of the land and naval forces." *And the 8th Amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operations "cases arising in the land or naval forces."* And by the 2d section of the 2d Article of the Constitution, it is declared that "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

Construction of 8th amendment Grand jury not required in cases, etc.

These provisions show that *Congress has the power to provide for the trial and punishment of military and naval offences, in the manner then and now practiced by civilized nations; and that the power to do so, is given without any connection between it and the 3d Article of the Constitution, defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other*...

Power of Congress to make laws for punishment of military and naval offences.

"The objection is ingeniously worded, was very ably argued, and we may add, with a clear view and knowledge of what the law is upon such a subject, and how the plaintiff's case may be brought under it, to make the defendant responsible on this action for false imprisonment. But it substitutes an imputed error in the finding of the Court, for the original subject matter of its jurisdiction, *seeking to make the marshal answerable* for his mere *ministerial execution of a sentence*, which the Court passed, the Secretary of the Navy approved, and which the President of the United States, as constitutional Commander-in-Chief of the army and navy of the United States, directed the marshal to execute, by receiving the prisoner and convict, Dynes, from the naval officer then having him in custody, to transfer him to the penitentiary, in accordance with the sentence which the Court had passed upon him. . . . . .

Has no connection with the judicial power.

Marshal not liable for ministerial act in executing sentence, etc.

"But the case in hand is *not one of a court without jurisdiction* over the subject matter, or that of one which has neglected the forms and rules of procedure enjoined for the exercise of jurisdiction. It was regularly convened; its forms of procedure were strictly observed as they are directed to be by the statute; and if its sentence be a deviation from it, which we do not admit, it is not absolutely void. Whatever the sentence is, or may have been, as it was not a trial by court martial taking place out of the United States, it could not have been carried into execution but by the confirmation of the President, had it extended to loss of life, or in cases not extending to loss of life, as this did not, but by the confirmation of the Secretary of the Navy, who ordered the Court. *And if a sentence be so confirmed, it becomes final, and must be executed, unless the President pardon the offenders. It is in the nature of an appeal to the officer ordering the court, who is made by the law the arbiter of the legality and propriety of the court's sentence. When confirmed it is altogether beyond the jurisdiction of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge*, or one in which, having jurisdiction over the subject matter, it *has failed to observe the rules prescribed by the statute for its exercise.* In such cases, as has just been said, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury." . . . . . .

Sentence of court martial *final.*

Civil courts have no jurisdiction over the sentence.

Except.

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Civil courts have no right to interfere with sentences of courts martial.

"*With the sentences of courts martial* which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, *civil courts have nothing to do*, nor are they in *any way alterable by them.* If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court martial has no *jurisdiction over the subject matter of the charge* it has been convened to try, or shall inflict a punishment *forbidden by the law*, though its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. (Harman *vs.* Tappenden, 1 East 555; as to ministerial officers, Marshall's Case, 10 Cr. 76; Morrison *vs.* Sloper, Wells, 30; Parton *vs.* Williams, B. and A. 330; and as to justices of the peace, by Ld. Tenterden, in Basten *vs.* Carew, 3 B. and C. 653; Mules *vs.* Calcott, 6 Bins. 85." . . . . .

Except.

Imprisonment in penitentiary of Dynes.

"In this case all of us think that *the court* which tried Dynes *had jurisdiction* over the subject matter of the charge against him; that the *sentence* of the court against him was *not forbidden by law;* and that having been *approved by the Secretary of the Navy* as a fair deduction from the 17th Article of the Act of April 23, 1800, and that *Dynes* having been *brought to Washington as a prisoner* by the *direction of the Secretary*, that the *President* of the United States, as constitutional Commander-in-Chief of the army and navy, and in virtue of his constitutional obligation that he shall take care that the laws be faithfully executed, *violated no law in directing the Marshal to receive the prisoner Dynes* from the officer commanding the United States steamer Engineer, for the purpose of transferring him to the penitentiary of the District of Columbia, and, consequently, that the *Marshal is not answerable in this action of trespass and false imprisonment.*"

Authority of sentence confirmed.

LEITENSDORFER *vs.* WEBB, 20 Howards S. C. Rep. 176.

Civil government of N. Mexico overthrown by conquest

"Upon the acquisition, in the year 1846, by the arms of the United States, of the Territory of New Mexico, the *civil government* of this territory having *been overthrown*, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and *in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary government for the acquired country.* By this substitution of a *new supremacy*, although the former *political relations* of the inhabitants were dissolved, their private relations, *their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, exccept so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States*, OR WITH ANY REGULATIONS WHICH THE CONQUERING AND OCCUPYING AUTHORITY SHOULD ORDAIN. Amongst the consequences which would be necessarily incident to the *change* of *sovereignty*, would be the *appointment or control of the agents by*

Provisional government ordered by Gen. Kearney.

Duty.

How far their former rights were changed.

What law is to be administered by military power.

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whom and the modes in which the government of the occupant should be administered, — this result being indispensable, in order to secure those objects for which such a government is usually established."

Conquest gives rights to change government and officers thereof in order to secure victory.

This is the principle of the law of nations, as expounded by the highest authorities. In the case of The Fama, in the 5th of Robinson's Rep. p. 106, Sir William Scott declares it to be "the settled principle of the law of nations, that the *inhabitants of a conquered territory change their allegiance*, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property *not taken from them by the orders of the conqueror*, remain undisturbed." So, too, it is laid down by Vattel, book 3d, ch. 13, sect. 200, that "the conqueror lays his hands on the possessions of the state, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is that they only change masters."

In the case of the United States *vs.* Perchiman, 7 Peters, pp. 86, 87, this court have said, "It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world be outraged, if private property should be *generally* confiscated and *private rights annulled.* The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed." (*Vide* also the case of Mitchel *vs.* The United States, 9th ib. 711, and Kent's Com. vol. 1, p. 177.)

Judicial system ordained.

Accordingly, we find that there was *ordained by the provisional Government a judicial system, which created a superior or appellate court, constituted of three judges, and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned.*

Courts established by military power. Jurisdiction, etc.

By the same authority, the jurisdiction of the Circuit Courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided for by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes (*Vide* Laws of New Mexico, Kearney's Code, p. 48). *Of the validity* of these ordinances of the provisional government there is made *no question with respect to the period during which the territory was held by the United States as occupying conqueror*, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances *must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them.* But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that, with the close of the contest, every institution which had been overthrown or suspended would be revived and reëstablished. The *fallacy of this pretension* is exposed by the fact, that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States, never to relinquish the possession ac-

Displaced all old laws incompatible, etc.

When terminated.

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How terminated.

quired by arms. We conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the territorial government in the exercise of powers delegated by Congress. That no power whatever, incompatible with the Constitution or laws of the United States, or with the authority of the provisional government, was retained by the Mexican government, or was revived under that government, from the period at which the possession passed to the authorities of the United States.

UNITED STATES SUPREME COURT. DECEMBER TERM, 1863,–4.

THE VALLANDIGHAM CASE.

Ex parte, in the matter of Clement L. Vallandigham, Petitioner; on petition for a writ of certiorari to the Judge Advocate-General of the Army of the United States.

There is no analogy between the power of the United States Court to issue writs of *certiorari*, and the prerogative power by which they issue in England.
United States Courts derive such power solely from the Constitution and Congressional legislation.
Such petitions are not within the letter or spirit of the grants of appellate jurisdiction to this court.
A military commission is not a court within the meaning of Section 14 of Act of 1789.
This Court has no power to originate a writ of *certiorari*, or to review or pronounce any opinion upon the proceedings of a military commission.
Affirmative words in the Constitution, giving this Court original jurisdiction in certain cases, must be construed negatively as to all other cases.

Petitioner charged with expressing disloyal sentiments and sympathy for rebels;

The petitioner was, on May 5, 1863, arrested at his residence, taken to Cincinnati, and on the next day, arraigned before a military commission, appointed by Major-General Burnside, commanding the Military Department of Ohio, on a charge of having expressed sympathies for those in arms against the United States Government, and for having uttered in a public speech disloyal sentiments and opinions. The petitioner refused to plead, and denied the jurisdiction of the commission. A plea of "not guilty" was therefore entered by the order of the commission, and the trial proceeded. Seven members of the commission were present, and tried the charge according to military law. The prisoner called and cross-examined witnesses; had the aid of counsel, and made a written argument.

Was tried, convicted, and sentenced;

The finding and sentence were that the petitioner was guilty of the substantial charges, and that he be placed in close confinement in some fortress of the United States, there to be kept during the remainder of the war. General Burnside approved the finding and sentence, and designated Fort Warren as the place of confinement. On the 19th of May, 1863, the President, in commutation of the sentence, directed the prisoner to be sent beyond our military lines, which order was executed.

Sentence commuted.

Mr. Justice Wayne delivered the opinion of the Court in which Nelson, J., concurred. After giving a detailed statement of the facts above briefly set forth, they continue as follows: —

"It has been urged in support of the motion for the writ of *cer-*

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tiorari, and against the jurisdiction of a military commission to try the petitioner, that the latter was prohibited by the 30th section of the Act of March 30, 1863, for enrolling and calling out the national forces,—12 Statutes at Large, 736,—as the crimes punishable in it by the sentence of a court-martial or a military commission applied only to persons who are in the military service of the United States, and subject to the articles of war; and also, that by the third section of the 3d Article of the Constitution, all crimes, except in cases of impeachment, were to be tried by juries in the State where the crime had been committed, and when not committed within any State, at such place as Congress may by law have directed; and that the military commission could have no jurisdiction to try the petitioner, as neither the charge against him nor its specifications imputed to him any offence known to the law of the land; that General Burnside had no authority to enlarge the jurisdiction of a military commission by the General Order Number Thirty-eight, or otherwise. General Burnside acted in the matter as the general commanding the Ohio Department, in conformity with the instructions for the government of the armies of the United States, approved by the President of the United States, and published by the Assistant Adjutant-General, by order of the Secretary of War, on the 24th of April, 1863.*

Constitutional objections stated.

It is affirmed in the thirteenth paragraph of the first section of these Instructions, that "military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences, under the statute, must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular country. In the armies of the United States, the first is exercised by courts martial; while cases which do not come within the 'rules and articles of war,' or the jurisdiction conferred by statute or court martial, are tried by military commissions."

These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it to set up a government of its own.

Our first remark upon the motion for a *certiorari* is, that there is no analogy between the power given by the Constitution and laws of the United States to the Supreme Court and the other inferior courts of the United States, and to the judges of them to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United

* They were prepared by Francis Leiber, LL. D., and were revised by a board of officers, of which Major-General E. A. Hitchcock was president.

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States derive authority to issue such a writ from the Constitution and the legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the motion we are considering for its exercise by this Court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject. "The judicial power of the United States shall be vested in the Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." "The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting embassadors, other public ministers and consuls," etc., "and in all cases affecting embassadors, other ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." Then Congress passed the act to establish the judicial courts of the United States, — 1 Stats. at Large, p. 73, chap. 20, — and in the 13th section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against embassadors or other public ministers or their domestics or their domestic servants as a court of law can have or exercise consistently with the laws of nations, and original but not exclusive jurisdiction of suits brought by embassadors, or other public ministers, or in which a consul or vice-consul shall be a party. In the same section the Supreme Court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived that the jurisdiction given, besides that which is mentioned in the preceding part of the section, is an exclusive jurisdiction of suits or proceedings against embassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations, and original, but not exclusive, jurisdiction of all suits brought by embassadors, or other public ministers, or in which a consul or vice-consul shall be a party, thus guarding them from all other judicial interference and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration that the Supreme Court had original jurisdiction in all cases affecting embassadors and other public ministers and consuls and those in which a State shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. Durousseau *vs.* The United States, 6 Cranch, 314; Barry *vs.* Mercien, 5 How. 119; United States *vs.* Currey, 6 How. 113; Forsyth *vs.* United States, 9 How. 571. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms, as used in the third article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act

A military commission not a court, within the meaning of the Judiciary Act.

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of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the 'before-mentioned' courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions agreeably to the principles and usages of law. The words in the section, 'the before-mentioned' courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them. Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the fourteenth section of the Act; and further that the court cannot, without disregarding its frequent decisions and interpretations of the Constitution in respect to its judicial power, originate a writ of *certiorari* to review or pronounce any opinion upon the proceedings of a military commission. It was natural, before the sections of the third articles of the Constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section of the Act of 24th September, 1789, gave to this court a right to originate processes of *habeas corpus ad subjiciendum* and writs of *certiorari*, to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation that in all cases affecting embassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

No *certiorari* can issue from the Supreme Court to review proceedings of a military commission.

This limitation has always been considered restrictive of any other original jurisdiction. The rule of construction of the Constitution being, that affirmative words in the Constitution declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases. 1 Cranch, 137; 5 Peters, 284; 12 Peters, 637; 9 Wheaton; 6 Wheaton, 264.

The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum*, have been fully discussed by this court at different times. We do not think it necessary, however, to examine or cite many of them at this time. We will annex a list to this opinion, distinguishing what this court's action has been in cases brought to it by appeal, from such applications as have been rejected, when it has been asked that it would act upon the matter as one of original jurisdiction. In the case *Ex parte* Milburn, 9 Peters, 704, Chief Justice Marshall said, as the jurisdiction of the court is appellate, it must first be shown that it has the power to award a *habeas corpus*. In *Ex parte* Kaine, 14 Howard, the court denied the motion, saying that the court's jurisdiction to award the writ was appellative, and that the case had not been so presented to it, and for the same cause refused to issue a writ of *certiorari*, which in the course of the argument was prayed for. In *Ex parte* Metzger, 5 How. 176, it was determined that a writ of *certiorari* could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France,

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Military commission exercises special authority;

for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. *So does a court of military commission exercise a special authority.* In the case before us, it was urged that the decision in Metzger's case had been made upon the ground that the proceeding of the district judge was not judicial in its character, but that the proceedings of the military commission were so; and, further, it was said that the ruling in that case had been overruled by a majority of the judges in Kaine's case. There is a misapprehension of the report of the latter case; and as to the judicial character of the proceedings of the military commission, we cite what was said by the court in the case of Ferreira. "The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them, but it is not judicial in either case, in the sense in which the judicial power is granted to the courts of the United States." 13 Howard, 48.

Not *judicial;*

Its proceedings cannot be reversed by the Supreme Court.

Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission. And as to the President's action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court in the cases of Martin *vs.* Mott, 12 Wheaton, pages 19, 28 to 35 inclusive; and Dynes *vs.* Hoover, 20 Howard, page 65, &c.

For the reasons given, our judgment is, that the writ of *certiorari* prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced, and imprisoned, must be denied, and so do we order accordingly."

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THE CHEROKEE NATION *v.* THE STATE OF GEORGIA, 5 Peters, 1.

This case is thus stated by Nelson, J., in delivering the opinion of the court in 6 *Wallace*, 73, 74: —

A bill was filed in that case, and an injunction prayed for to prevent the execution of certain acts of the legislature of Georgia within the territory of the Cherokee nation of Indians, they claiming a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The acts of the legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians, and subjected them to the jurisdiction of the State. The injunction was denied, on the ground that the Cherokee nation could not be regarded as a foreign nation within the judiciary act, and that therefore they had no standing in court. But Chief Justice Marshall, who delivered the opinion of the majority, very strongly intimated that the bill was untenable on another ground, namely, that it involved simply a political question. He observed "that the part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the province of the judicial department." Several opinions were delivered in the case, a very elaborate one by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee nation was a foreign nation within the judiciary act, and competent to bring the suit, but agreed with the Chief Justice that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the lands which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed, —

"For the purpose of guarding against any erroneous conclusions, it is proper I should state that I do not claim for this court the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief, to the full extent prayed for by the bill, may be beyond the reach of this court. Much of the matters therein contained by way of complaint would seem to depend for relief upon the exercise of political power, and as such appropriately devolving upon the executive and not the judicial department of the government. This court can grant relief so far, only, as the rights of persons or property are drawn in question, and have been impinged."

And, in another part of the opinion, he returns again to this question, and is still more emphatic in disclaiming jurisdiction. He observes, "I certainly do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and improvement of many rights secured by treaties most certainly does not belong to the judiciary. It is only where the rights of persons and property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a

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remedy is not to be had here." "We have said," continues Judge Nelson, "that Mr. Justice Story concurred in this opinion, and Mr. Justice Johnson, who also delivered one, recognized the same distinctions." (5 Peters, 29, 30).

THE STATE OF RHODE ISLAND *v.* THE STATE OF MASSACHUSETTS, 12 Peters, 657.

(Distinction between political and judicial matters, &c. Courts have no jurisdiction of political questions.)

This case involved a question of boundary between the two States. It has been said that this was a political controversy between the parties. But Mr. Justice Baldwin, who delivered the opinion of the court, declared that the controversy, as developed in the pleadings, was as to the locality of a point three miles south of the southernmost point of Charles River, and as to the question whether a stake set up on Wrentham Plain in 1842 was the true point from which to run an east and west line as the compact boundary between the two States. "In the first aspect of the case it depends on a fact; in the second, on the law of equity whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature, of frequent occurrence in suits between individuals."

In another part of the opinion, speaking of the submission by sovereigns or states of a controversy between them, he says, "From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo,* of political power."

The court (Nelson, J.), in commenting on this decision in the case of *The State of Georgia* v. *Stanton* (6 Wallace, 73), expressly declare that "the objections to the jurisdiction of the court in that case were, that the subject matter of the bill involved sovereignty and jurisdiction, which were not matters of property, but of political rights over the territory in question. They are forcibly stated by the Chief Justice, who dissented from the opinion (12 Pet. 752, 754.) The very elaborate examination of the case by Mr. Justice Baldwin was devoted to an answer and refutation of these objections. He endeavored to show, and we think did show, that the question was one of boundary, which of itself was not a political question, but one of property appropriate for judicial cognizance, and that sovereignty and jurisdiction were but incidental and dependent upon the main issue in the case."

It will be observed that Chief Justice Taney denied the jurisdiction of the court on the ground that the cause involved the determination of a political question, and the majority of the court claimed jurisdiction on the ground that the question in issue was not a political question; all the judges, in their opinions, declared, in effect, that if the question were political, the court would have no jurisdiction over it. This case was between two States in the Union, and not between the United States and a third party. It tends to show that the judicial power cannot protect or enforce the mere political jusisdiction of one State in the Union against another, although it may determine controversies or questions of property, involving the ascertainment of boundary lines, or of any other facts which have been settled by political authority, and in all its proceedings following and conforming to the decisions of the political departments on political questions.

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UNITED STATES *v.* MORENO, 1 Wallace, 400.

The marginal note reads thus: "The cession of California to the United States did not impair the rights of private property." These rights were consecrated by the law of nations, and protected by the treaty of Guadalupe Hidalgo. The act of March 3, 1851, to ascertain and settle private land claims in the State of California, was passed to assure to the inhabitants of the ceded territory the benefit of the rights thus secured to them. It recognizes both legal and equitable rights, and should be administered in a liberal spirit.

THE CIRCASSIAN, 2 Wallace, 150. (1864–5.)

"There is a distinction between simple and public blockades, which supports this conclusion" (that the blockade of New Orleans was continuous, and had not been interrupted). "A simple blockade may be established by a naval officer, acting upon his own discretion, or under direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation.

"The blockade of the rebel ports was and is of the latter sort. It was legally established and regularly notified by the American government to the neutral governments. Of such a blockade it was well observed by Sir William Scott, 'It must be conceived to exist till the revocation of it is actually notified.' The blockade of the rebel ports, therefore, must be presumed to have continued until notice of discontinuance (*The Betsey, Goodhue master*, 1 Robinson, 282; *The Neptune*, 1 id. 144). It is indeed the duty of the belligerent blockade government to give prompt notice; and if it fails to do so, proof of discontinuance may be otherwise made, but subject to just responsibility to other nations; it must judge for itself when it can dispense with blockade. It must decide when the object of blockade, namely, prevention of commerce with enemies, can be attained by military force, or, when the enemies are rebels, by military force and municipal law, without the aid of a blockading force. The government of the United States acted on these views. Upon advice of the capture of New Orleans, it decided that the blockade of the port might be safely dispensed with, except as to contraband of war, from and after the 1st of June. The President therefore, on the 12th of May, issued his proclamation to that effect, and its terms were undoubtedly notified to neutral powers. This action of the government must, under the circumstances of this case, be held to be conclusive evidence that the blockade of New Orleans was not terminated by military occupation on the 4th of May. New Orleans, therefore, was under blockade when the Circassian was captured."

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THE VENICE, 2 Wallace, 274. (64–5.)

The court say, that "while these transactions were in progress (April, 1862), the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each State were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government, and of all the citizens or subjects of the other, applies equally to civil and to international wars. (*Prize Cases*, 2 Black. 266; *concurred in by dissenting parties*, id. 687–688.) Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application."

"Cooke was a British subject, but was identified with the people of Louisiana by long voluntary residence, and by the relations of active business. (*Prize Cases*, 2 Black. 674.) Upon breaking out of the war, he might have left the State, and withdrawn his means; but he did not think fit to do so. He remained more than a year, engaged in commercial transactions. Like many others, he seemed to have thought that, as a neutral, he could share the business of the enemies of the nation, and enjoy the profits, without incurring the responsibilities of an enemy. He was mistaken. He chose his relations, and must abide by their results. The ship and cargo were as liable to seizure as prize in his ownership as they would be in that of any citizen of Louisiana, residing in New Orleans, and not actively engaged in hostilities against the Union."

After explaining the policy of the government to respect and enforce the rights of persons' property wherever the national troops had re-established order under national rule, and mentioning the proclamation of General Butler as mere manifestation of the policy of government, and as not to be interpreted by such rules as governed the case of "The Ships taken at Genoa" (4 Robinson, 387), the court say, —

"Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States, after the publication of the proclamation, must be regarded as protected by its terms.

"It results from this reasoning that the Venice and her cargo, though undoubtedly enemy's property at the time she was anchored in Lake Pontchartrain, cannot be regarded as remaining such after the 6th of May, for it is not asserted that any breach of blockade was ever thought of by the claimant, or that he was guilty of any act of hostility against the national government."

MRS. ALEXANDER'S COTTON, 2 Wallace, 417. (1864–5.)

The Chief Justice delivered the opinion of the Court.

This controversy concerns seventy-two bales of cotton captured in May, 1864, on the plantation of Mrs. Elizabeth Alexander, on the Red River, by a party sent from the Ouachita, a gunboat belonging to Admiral Porter's expedition. The United States insist on the condemnation of the cotton as lawful maritime prize. Mrs. Alexander claims it as her private property. The facts may be briefly stated.

In the spring of 1864, a naval force of the United States, under Rear Admiral Porter, co-operating with a military force on land, under Major

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General Banks, proceeded up Red River towards Shreveport, in Louisiana. The whole region at the time was in rebel occupation, and under rebel rule.

Fort De Russy, about midway between the mouth of the river and Alexandria, was captured by the Union troops about the middle of March. The insurgent troops gradually retired until a considerable district of country on Red River came under the control of the national forces. This control, however, was of brief continuance. An unexpected reverse befell the expedition. The army under General Banks was defeated, and was soon after entirely withdrawn from the Red River country. The naval force, under Admiral Porter, necessarily followed, and rebel rule and ascendency were again complete and absolute. The military occupation by the Union troops lasted rather less than eight weeks. Its duration was measured by the time required for the advance and retreat of the army and navy.

The Parish of Avoyelles was a part of the district thus temporarily occupied; and the plantation of Mrs. Alexander was in this parish, and upon the river. The seventy-two bales of cotton in controversy were raised on the plantation, and were stored in a warehouse about a mile from the river bank. A party from the Ouachita, under orders from the naval commander, landed on the plantation about the 26th of March, and took possession of the cotton. It was sent to Cairo, libelled as prize of war in the District Court for the Southern District of Illinois, claimed by Mrs. Alexander, and, by decree of the District Court, restored to her.

The United States now ask for the reversal of this decree, and the condemnation of the property as maritime prize.

After the seizure of the cotton, Mrs. Alexander took the oath required by the President's proclamation of amnesty. The evidence in relation to her previous personal loyalty is somewhat conflicting. She had furnished mules and slaves, involuntarily as alleged, to aid in the construction of the rebel Fort De Russy.

She now remains in the rebel territory. Before the retreat of the Union troops, elections are stated to have been held, under military auspices, for delegates to a constitutional convention about to meet in New Orleans.

These facts present the question: Was this cotton lawful maritime prize, subject to the prize jurisdiction of the courts of the United States?

There can be no doubt, we think, that it was enemy's property. The military occupation by the national military forces was too limited, too imperfect, too brief, and too precarious to change the enemy relation created for the country and its inhabitants by three years of continuous rebellion, interrupted, at last, for a few weeks, but immediately renewed, and ever since maintained. The Parish of Avoyelles, which included the cotton plantation of Mrs. Alexander, included also Fort De Russy, constructed in part by labor from the plantation. The rebels reoccupied the fort as soon as it was evacuated by the Union troops, and have since kept possession.

It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause, and that her property therefore cannot be regarded as enemy property; but this court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies, until, by the action of the legislature and the Executive, or otherwise, that relation is thoroughly and permanently changed.

We attach no importance, under the circumstances, to the elections said to have been held for delegates to the constitutional convention.

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Being enemy's property, the cotton was liable to capture and confiscation by the adverse party.* It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted "to special cases dictated by the necessary operation of the war," † and as excluding, in general, "the seizure of the private property of pacific persons for the sake of gain." ‡

The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies.

In the case before us, the capture seems to have been justified by the peculiar character of the property and by legislation. It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. It is matter of history, that rather than permit it to come into the possession of the national troops, the rebel government has everywhere devoted it, however owned, to destruction. The value of that destroyed at New Orleans, just before its capture, has been estimated at eighty millions of dollars. It is in the record before us, that on this very plantation of Mrs. Alexander, one year's crop was destroyed in apprehension of an advance of the Union forces. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion.

And the capture was justified by legislation as well as by public policy. The act of Congress to confiscate property used for insurrectionary purposes, approved August 6, 1861, declares all property employed in aid of the rebellion, with consent of the owners, to be lawful subject of prize and capture wherever found.§ And it further provided, by the act to suppress insurrection, and for other purposes, approved July 17, 1862, ‖ that the property of persons who had aided the rebellion, and should not return to allegiance after the President's warning, should be seized and confiscated. It is in evidence that Mrs. Alexander was a rebel enemy at the time of the enactment of this act; that she contributed to the erection of Fort De Russy, after the passage of the act of July, 1862, and so comes within the spirit, if not within the letter, of the provisions of both.

If, in connection with these acts, the provisions of the Captured and Abandoned Property Act of March 12, 1863,¶ be considered, it will be difficult to conclude that the capture under consideration was not warranted by law. This last-named act evidently contemplated captures by the naval forces distinct from maritime prize; for the secretary of the navy, by his order of March 31, 1863, directed all officers and sailors to turn over to the agents of the Treasury Department all property captured or seized in any insurrectionary district, excepting lawful maritime prize.** Were this otherwise, the result would not be different, for Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist. Whatever might have been the effect of the amnesty had she removed to a loyal State after taking the oath, it can have none on her relation as enemy voluntarily resumed by continued residence and interest.

* Prize Cases, 2 Black. 687. † 1 Kent, 92. ‡ Id. 93.
§ 12 Stat. at Large, 319. ‖ Id. 591. ¶ Id. 820.
** Report of the Secretary of the Treasury on the Finances, December 10, 1863, p. 438.

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But this reasoning, while it supports the lawfulness of the capture, by no means warrants the conclusion that the property captured was maritime prize. We have carefully considered all the cases cited by the learned counsel for the captors, and are satisfied that neither of them is an authority for that conclusion. In no one of these cases does it appear that private property on land was held to be maritime prize; and on the other hand, we have met with no case in which the capture of such private property was held unlawful except that of Thorshaven.* In this case such a capture was held unlawful, not because the property was private, but because it was protected by the terms of a capitulation. The rule in the British Court of Admiralty seems to have been that the court would take jurisdiction of the capture, whether of public or private property, and condemn the former for the benefit of the captors, under the prize acts of Parliament, but retain the later till claimed, or condemn it to the crown, to be disposed of as justice might require. But it is hardly necessary to go into the examination of these English adjudications, as our own legislation supplies all needed guidance in the decision of this case.

There is certainly no authority to condemn any property as prize for the benefit of the captors, except under the law of the country in whose service the capture is made; and the whole authority found in our legislation is contained in the act for the better government of the navy, approved July 17, 1862. By the second section of the act,† it is provided that the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall be the sole property of the captors, or, in certain cases, divided equally between the captors and the United States. By the twentieth section, all provisions of previous acts inconsistent with this act are repealed. This act excludes property on land from the category of prize for the benefit of captors, and seems to be decisive of the case so far as the claims of captors are concerned.

As a case of lawfully captured property, not for the benefit of captors, its disposition is controlled by the laws relating to such property. By these laws and the orders under them, all officers, military and naval, and all soldiers and sailors, are strictly enjoined, under severe penalties, to turn over any such property which may come to their possession to the agents of the Treasury Department; and these agents are required to sell all such property to the best advantage, and pay the proceeds into the national treasury. Any claimant of the property may, at any time within two years after the suppression of the rebellion, bring suit in the Court of Claims, and on proof of ownership of the property, or of title to the proceeds, and that the claimant has never given aid or comfort to the rebellion, have a decree for the proceeds, deducting lawful charges. In this war, by this liberal and beneficent legislation, a distinction is made between those whom the rule of international law classes as enemies. All who have in fact maintained a loyal adhesion to the Union are protected in their rights to captured as well as abandoned property.

It seems that, in further pursuance of the same views, by an act of the next session, Congress abolished maritime prize on inland waters, and required captured vessels, and goods on board, as well as all other captured property, to be turned over to the treasury agents, or to the proper officers of the courts. This act became a law a few weeks after the capture now under consideration, and does not apply to it. It is cited only in illustration of the general policy of legislation to mitigate, as far as practicable, the harshness of the rules of war, and preserve for loyal owners, obliged by

* Edwards, 107. † 12 Stat. at Large, 606.

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circumstances to remain in rebel States, all property, or its proceeds, to which they have just claims, and which may in any way come to the possession of the government or its officers.

We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agents of the Treasury Department, to be disposed of under the act of March 12, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now be paid into the treasury of the United States, in order that the claimant, when the rebellion is suppressed, or she has been able to leave the reoel region, may have the opportunity to bring her suit in the Court of Claims, and, on making the proof required by the act, have the proper decree.

The decree of the District Court is reversed.

Ex Parte Milligan, 4 Wallace S. C. Rep. 106. (Dec. Term, 1866.)

At the close of the last term the Chief Justice announced the order of the court in this and in two other similar cases (those of Bowles and Horsey) as follows: —

1. That, on the facts stated in said petition and exhibits, a writ of *habeas corpus* ought to be issued, according to the prayer of the said petitioner.

2. That, on the facts stated in the said petition and exhibits, the said Milligan ought to be discharged from custody, as in said petition is prayed, according to the act of Congress passed March 3, 1863, entitled "An Act relating to *habeas corpus* and regulating judicial proceedings in certain cases."

3. That, on the facts stated in said petition and exhibits, the military commission mentioned therein had no jurisdiction legally to try and sentence said Milligan in the manner and form as in said petition and exhibits are stated.

At the opening of the present term, opinions were delivered.

Mr. Justice Davis delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been, in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana, and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specfications, found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and impanelled a grand jury, who were charged to inquire whether the laws of the United States had been violated;

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and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever; and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

The prayer of the petition was, that under the act of Congress, approved March 3, 1863, entitled "An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land, or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court: —

1. "On the facts stated in said petition and exhibits, ought a writ of *habeas corpus* to be issued?"

2. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody, as in said petition prayed?"

3. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits are stated?"

The importance of the main question presented by this record cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty.

During the late wicked rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then* considerations of safety were mingled with the exercise of power, and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment. We approach the investigation of this case, fully sensible of the magnitude of the inquiry and the necessity of full and cautious deliberation.

But we are met with a preliminary objection. It is insisted that the Circuit Court of Indiana had no authority to certify these questions; and that we are without jurisdiction to hear and determine them.

The sixth section of the "Act to amend the judicial system of the United States," approved April 29, 1802, declares "that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall,

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during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court at their next session to be held thereafter, and shall by the said court be finally decided: And the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order: *Provided*, That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

It is under this provision of law, that a Circuit Court has authority to certify any question to the Supreme Court for adjudication. The inquiry, therefore, is, whether the case of Milligan is brought within its terms.

It was admitted at the bar that the Circuit Court had jurisdiction to entertain the application for the writ of *habeas corpus*, and to hear and determine it; and it could not be denied, for the power is expressly given in the 14th section of the Judiciary Act of 1789, as well as in the later act of 1863. Chief Justice Marshall, in Bollman's case,* construed this branch of the Judiciary Act to authorize the courts as well as the judges to issue the writ for the purpose of inquiring into the cause of the commitment; and this construction has never been departed from. But it is maintained with earnestness and ability, that a certificate of division of opinion can occur only in a *cause*, and that the proceeding by a party moving for a writ of *habeas corpus* does not become a cause *until after the writ has been issued and a return made.*

Independently of the provisions of the act of Congress of March 3, 1863, relating to *habeas corpus*, on which the petitioner bases his claim for relief, and which we will presently consider, can this position be sustained?

It is true, that it is usual for a court, on application for a writ of *habeas corpus*, to issue the writ, and, on the return, to dispose of the case; but the court can elect to waive the issuing of the writ, and consider whether, upon the facts presented in the petition, the prisoner, if brought before it, could be discharged. One of the very points on which the case of Tobias Watkins, reported in 3 Peters,† turned, was, whether, if the writ was issued, the petitioner would be remanded upon the case which he had made.

The Chief Justice, in delivering the opinion of the court, said, "The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded if the court is satisfied that the prisoner would be remanded to prison."

The judges of the Circuit Court of Indiana were, therefore, warranted by an express decision of this court in refusing the writ, if satisfied that the prisoner on his own showing was rightfully detained.

But it is contended, if they differed about the lawfulness of the imprisonment, and could render no judgment, the prisoner is remediless, and cannot have the disputed question certified under the act of 1802. His remedy is complete by writ of error or appeal, if the court renders a final judgment refusing to discharge him; but if he should be so unfortunate as to be placed in the predicament of having the court divided on the question whether he should live or die, he is hopeless and without remedy. He wishes the vital question settled, not by a single judge at his chambers, but by the highest tribunal known to the Constitution; and yet the privilege is denied him; because the Circuit Court consists of two judges, instead of one.

Such a result was not in the contemplation of the legislature of 1802; and the language used by it cannot be construed to mean any such thing. The

* 4 Cranch, 75. † Page 193.

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clause under consideration was introduced to further the ends of justice, by obtaining a speedy settlement of important questions where the judges might be opposed in opinion.

The act of 1802 so changed the judicial system that the Circuit Court, instead of three, was composed of two judges; and, without this provision or a kindred one, if the judges differed, the difference would remain, the question be unsettled, and justice denied. The decisions of this court upon the provisions of this section have been numerous. In *United States* v. *Daniel*,* the court, in holding that a division of the judges on a motion for a new trial could not be certified, say, that "the question must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause." Testing Milligan's case by this rule of law, is it not apparent that it is rightfully here, and that we are compelled to answer the questions on which the judges below were opposed in opinion? If, in the sense of the law, the proceeding for the writ of *habeas corpus* was the "*cause*" of the party applying for it, then it is evident that the "cause" was pending before the court, and that the questions certified arose out of it, belonged to it, and were matters of right, and not of discretion.

But it is argued, that the proceeding does not ripen into a cause until there are two parties to it.

This we deny. It was the *cause* of Milligan when the petition was presented to the Circuit Court. It would have been the *cause* of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right" — and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action, from *ago*, to urge and drive."

In any legal sense, action, suit, and cause are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But the true meaning to the term "suit" has been given by this court. One of the questions in *Weston* v. *City Council of Charleston* † was, whether a writ of prohibition was a suit; and Chief Justice Marshall says, "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly Milligan pursued the only remedy which the law afforded him.

Again, in *Cohens* v. *Virginia*,‡ he says, "In law language a suit is the prosecution of some demand in a court of justice." Also, "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand." When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law. One of the questions in *Holmes* v. *Jennison et al.* § was, whether, under the twenty-fifth section of the Judiciary Act, a proceeding for a writ of *habeas corpus* was a "suit." Chief Justice Taney held, that, "if a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much

* 6 Wheaton, 542. † 2 Peters, 449. ‡ 6 Wheaton, 264. § 14 Peters, 540.

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diversity of opinion on another ground of jurisdiction; but that, in the sense of the twenty-fifth section of the Judiciary Act, the proceeding by *habeas corpus* was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause," as used in the section, mean the same thing.

The court do not say, that a return must be made, and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a *suit* — the suit of the party making the application. If it is a suit under the twenty-fifth section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the sixth section of the act of 1802.

But it is argued, that there must be *two* parties to the suit, because the point is to be stated upon the request of "either party or their counsel."

Such a literal and technical construction would defeat the very purpose the legislature had in view, which was to enable any party to bring the case here, when the point in controversy was a matter of right, and not of discretion; and the words "either party," in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction. Although this case is here *ex parte*, it was not considered by the court below without notice having been given to the party supposed to have an interest in the detention of the prisoner. The statements of the record show that this is not only a fair, but conclusive inference. When the counsel for Milligan presented to the court the petition for the writ of *habeas corpus*, Mr. Hanna, the District Attorney for Indiana, also appeared; and, by agreement, the application was submitted to the court, who took the case under advisement, and on the next day announced their inability to agree, and made the certificate. It is clear that Mr. Hanna did not represent the petitioner, and why is his appearance entered? It admits of no other solution than this, — that he was informed of the application, and appeared on behalf of the government to contest it. The government was the prosecutor of Milligan, who claimed that his imprisonment was illegal, and sought, in the only way he could, to recover his liberty. The case was a grave one; and the court, unquestionably, directed that the law officer of the government should be informed of it. He very properly appeared, and, as the facts were uncontroverted and the difficulty was in the application of the law, there was no useful purpose to be obtained in issuing the writ. The cause was, therefore, submitted to the court for their consideration and determination.

But Milligan claimed his discharge from custody by virtue of the act of Congress "relating to *habeas corpus*, and regulating judicial proceedings in certain cases," approved March 3, 1863. Did that act confer jurisdiction on the Circuit Court of Indiana to hear this case?

In interpreting the law, the motives which must have operated with the legislature in passing it are proper to be considered. This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of *habeas corpus* should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned; it was claimed that Congress alone could exercise this power, and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be fully established. It was

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under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was authorized by it to suspend the privilege of the writ of *habeas corpus*, whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty.

It is proper, therefore, to inquire under what circumstances the courts could rightfully refuse to grant this writ, and when the citizen was at liberty to invoke its aid.

The second and third sections of the law are explicit on these points. The language used is plain and direct, and the meaning of the Congress cannot be mistaken. The public safety demanded, if the President thought proper to arrest a suspected person, that he should not be required to give the cause of his detention on return to a writ of *habeas corpus*. But it was not contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings, known to the common law, were commenced against him. The Secretaries of State and War were directed to furnish to the judges of the courts of the United States a list of the names of all parties, not prisoners of war, resident in their respective juisdictions, who then were or afterwards should be held in custody by the authority of the President, and who were citizens of States in which the administration of the laws in the Federal tribunals was unimpaired. After the list was furnished, if a grand jury of the district convened and adjourned, and did not indict or present one of the persons thus named, he was entitled to his discharge; and it was the duty of the judge of the court to order him brought before him to be discharged, if he desired it. The refusal or omission to furnish the list could not operate to the injury of any one who was not indicted or presented by the grand jury; for, if twenty days had elapsed from the time of his arrest and the termination of the session of the grand jury, he was equally entitled to his discharge as if the list were furnished; and any credible person, on petition verified by affidavit, could obtain the judge's order for that purpose.

Milligan, in his application to be released from imprisonment, averred the existence of every fact necessary, under the terms of this law, to give the Circuit Court of Indiana jurisdiction. If he was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen of Indiana, and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him, *then* the court had the right to entertain his petition and determine the lawfulness of his imprisonment. Because the word "court" is not found in the body of the second section, it was argued at the bar, that the application should have been made to a judge of the court, and not to the court itself; but this is not so, for power is expressly conferred, in the last proviso of the section, on the court equally with a judge of it, to discharge from imprisonment. It was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him. Courts are not always in session, and can adjourn on the discharge of the grand jury, and before those who are in confinement could take proper steps to procure their liberation. To provide for this contingency, authority was given to the judges, out of court, to grant relief to any party who could show that, under the law, he should be no longer restrained of his liberty.

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It was insisted that Milligan's case was defective, because it did not state that the list was furnished to the judges; and, therefore, it was impossible to say under which section of the act it was presented.

It is not easy to see how this omission could affect the question of jurisdiction. Milligan could not know that the list was furnished, unless the judges volunteered to tell him; for the law did not require that any record should be made of it, or anybody but the judges informed of it. Why aver the fact, when the truth of the matter was apparent to the court without an averment? How can Milligan be harmed by the absence of the averment, when he states that he was under arrest for more than sixty days before the court and grand jury, which should have considered his case, met at Indianapolis? It is apparent, therefore, that under the *Habeas Corpus* Act of 1863 the Circuit Court of Indiana had complete jurisdiction to adjudicate upon this case, and if the judges could not agree on questions vital to the progress of the cause, they had the authority (as we have shown in a previous part of this opinion), and it was their duty, to certify those questions of disagreement to this court for final decision. It was argued that a final decision on the questions presented ought not to be made, because the parties who were directly concerned in the arrest and detention of Milligan were not before the court; and their rights might be prejudiced by the answer which should be given to those questions. But this court cannot know what return will be made to the writ of *habeas corpus* when issued; and it is very clear that no one is concluded upon any question that may be raised to that return. In the sense of the law of 1802, which authorized a certificate of division, a final decision means final upon the points certified; final upon the court below, so that it is estopped from any adverse ruling in all the subsequent proceedings of the cause.

But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President.

Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case. It can never be, in this country of written Constitution and laws, with a judicial department to interpret them, that any chief magistrate would be so far forgetful of his duty, as to order the execution of a man who denied the jurisdiction that tried and convicted him, *after* his case was before Federal judges with power to decide it, who, being unable to agree on the grave questions involved, had, according to known law, sent it to the Supreme Court of the United States for decision. But even the suggestion is injurious to the Executive, and we dismiss it from further consideration. There is, therefore, nothing to hinder this court from an investigation of the merits of this controversy.

The controlling question in the case is this: Upon the *facts* stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it *jurisdiction*, legally, to try and sentence him? Milligan, not a resident of one of the rebellious States, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birth-

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right of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishmeut, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere: if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, that "the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure, and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that, with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." These securities for personal liberty, thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition, and but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitu-

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tional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish;" and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there, for any offence whatever, of a citizen in civil life, in no wise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana, to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their pnnishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a State eminently distinguished for patriotism, by judges commissioned during the rebellion, who were provided with juries upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and

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was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the *law* said, Arrest him, confine him closely, render him powerless to do further mischief, and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right* — one of the most valuable in a free country — is preserved to every one accused of crime, who is not attached to the army or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury" — language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment or presentment before any one can be held to answer for high crimes, "*excepts* cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger;" and the framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common law courts; and in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion — if the passions of men are aroused and the restraints of law weakened, if not disregarded — these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the

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lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then, when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power" — the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable, and in the conflict one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew — the history of the world told them — the nation they were founding, be its existence short or long, would be involved in war; how often, or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus.*

It is essential to the safety of every government, that in a great crisis like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus.* In every war there are men, of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus.* The Constitution goes no farther. It does not say, after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it.

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The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late rebellion, required that the loyal States should be placed within the limits of certain military districts, and commanders appointed in them; and it is urged that this, in a military sense, constituted them the theatre of military operations; and as in this case Indiana had been, and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion, it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so, in the case of a foreign invasion, martial rule may become a necessity in one State, when in another it would be "mere lawless violence."

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We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer, and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate, and denounced the trial as illegal, because it did not appear that the courts of law in Demerara could not try offences, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our revolutionary fathers on this subject, although Boston was almost in a state of siege when General Gage issued his proclamation of martial law, they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly also denounced a similar measure on the part of Governor Dunmore, "as an assumed power, which the king himself cannot exercise, because it annuls the law of the land, and introduces the most execrable of all systems, martial law."

In some parts of the country, during the war of 1812, our officers made arbitrary arrests, and by military tribunals tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith* v. *Shaw* and *McConnell* v. *Hampden* (reported in 12 Johnson *), are illustrations, which we cite, not only for the principles which they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended that *Luther* v. *Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II., in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the *old* government, broke open the house of Luther, who supported the *new*, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the State, Borden was justified. This court

* Pages 257 and 234.

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held that a State "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which *this court* could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the State judiciary, he was justified in breaking into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may be exercised by a State."

We do not deem it important to examine further the adjudged cases, and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

It is proper to say, although Milligan's trial and conviction by a military commission was illegal, yet, if guilty of the crimes imputed to him, and his guilt had been ascertained by an established court and impartial jury, he deserved severe punishment. Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct. It is said the severity of the laws caused them; but Congress was obliged to enact severe laws to meet the crisis; and as our highest civil duty is to serve our country when in danger, the late war has proved that rigorous laws, when necessary, will be cheerfully obeyed by a patriotic people, struggling to preserve the rich blessings of a free government.

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any farther with it.

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3, 1863. The provisions of this law having been considered in a previous part of this opinion, we will not restate the views there presented. Milligan avers he was a citizen of Indiana, not in the military or naval service, and was detained in close confinement, by order of the President, from the 5th day of October, 1864, until the 2d day of January, 1865, when the Circuit Court for the District of Indiana, with a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him. If these averments were true (and their truth is conceded for the purposes of this case), the court was required to liberate him on taking certain oaths prescribed by the law, and entering into recognizance for his good behavior.

But it is insisted that Milligan was a prisoner of war, and, therefore, ex

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cluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the States in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

The Chief Justice delivered the following opinion: —

Four members of the court, concurring with their brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case.

We do not doubt that the Circuit Court for the District of Indiana had jurisdiction of the petition of Milligan for the writ of *habeas corpus*.

Whether this court has jurisdiction upon the certificate of division admits of more question. The construction of the act authorizing such certificates, which has hitherto prevailed here, denies jurisdiction in cases where the certificate brings up the whole cause before the court. But none of the adjudicated cases are exactly in point, and we are willing to resolve whatever doubt may exist in favor of the earliest possible answers to questions involving life and liberty. We agree, therefore, that this court may properly answer questions certified in such a case as that before us.

The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some time, when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the executive department of the government.

This sanction requires the most respectful and the most careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress.

We must inquire, then, what constitutional or statutory provisions have relation to this military proceeding.

The act of Congress of March 3, 1863, comprises all the legislation which seems to require consideration in this connection. The constitutionality of this act has not been questioned, and is not doubted.

The first section authorized the suspension, during the rebellion, of the writ of *habeas corpus* throughout the United States by the President. The two next sections limited this authority in important respects.

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The second section required that lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held or might thereafter be held as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the Circuit and District Courts. The lists transmitted to the judges were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute the judge's order, under penalty, for refusal or delay, of fine and imprisonment.

The third section provided, in case lists of persons other than prisoners of war then held in confinement, or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain the judge's order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

It was made the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

It was under this act that Milligan petitioned the Circuit Court for the District of Indiana for discharge from imprisonment.

The holding of the Circuit and District Courts of the United States in Indiana had been uninterrupted. The administration of the laws in the Federal courts had remained unimpaired. Milligan was imprisoned under the authority of the President, and was not a prisoner of war. No list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by the law. A grand jury had attended the Circuit Courts of the Indiana district, while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment, or otherwise proceeding against the prisoner.

His case was thus brought within the precise letter and intent of the act of Congress, unless it can be said that Milligan was not imprisoned by authority of the President; and nothing of this sort was claimed in argument on the part of the government.

It is clear upon this statement that the Circuit Court was bound to hear Milligan's petition for the writ of *habeas corpus*, called in the act an order to bring the prisoner before the judge or the court, and to issue the writ, or, in the language of the act, to make the order.

The first question, therefore, — Ought the writ to issue? —must be answered in the affirmative.

And it is equally clear that he was entitled to the discharge prayed for.

It must be borne in mind that the prayer of the petition was not for an absolute discharge, but to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty, to be discharged altogether.

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And the express terms of the act of Congress required this action of the court. The prisoner must be discharged on giving such recognizance as the court should require, not only for good behavior, but for appearance, as directed by the court, to answer and be further dealt with according to law.

The first section of the act authorized the suspension of the writ of *habeas corpus* generally throughout the United States. The second and third sections limited this suspension, in certain cases, within States where the administration of justice by the Federal courts remained unimpaired. In these cases the writ was still to issue, and under it the prisoner was entitled to his discharge by a circuit or district judge or court, unless held to bail for appearance to answer charges. No other judge or court could make an order of discharge under the writ. Except under the circumstances pointed out by the act, neither circuit nor district judge or court could make such an order. But under those circumstances, the writ must be issued, and the relief from imprisonment directed by the act must be afforded. The commands of the act were positive, and left no discretion to court or judge.

An affirmative answer must, therefore, be given to the second question, namely, Ought Milligan to be discharged according to the prayer of the petition?

That the third question, namely, Had the military commission in Indiana, under the facts stated, jurisdiction to try and sentence Milligan? must be answered negatively, is an unavoidable inference from affirmative answers to the other two.

The military commission could not have jurisdiction to try and sentence Milligan, if he could not be detained in prison under his original arrest or under sentence, after the close of a session of the grand jury, without indictment or other proceeding against him.

Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in States where these tribunals were not interrupted in the regular exercise of their functions.

Under it, in such States, the privilege of the writ might be suspended. Any person regarded as dangerous to the public safety might be arrested and detained until after the session of a grand jury. Until after such session, no person arrested could have the benefit of the writ; and even then, no such person could be discharged except on such terms, as to future appearance, as the court might impose. These provisions obviously contemplate no other trial or sentence than that of a civil court, and we could not assert the legality of a trial and sentence by a military commission, under the circumstances specified in the act and described in the petition, without disregarding the plain directions of Congress.

We agree, therefore, that the first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them we find sufficient and controlling reasons for our conclusions.

But the opinion which has just been read goes farther, and, as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow, that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the government of the United States — neither President, nor Congress, nor the Courts — possesses any power not given by the Constitution.

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We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of *habeas corpus*, and of its suspension, with two reservations: (1.) That in our judgment, when the writ is suspended, the executive is authorized to arrest as well as to detain; and (2.) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in States where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

We do not think it necessary to discuss at large the grounds of our conclusions. We will briefly indicate some of them.

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed, that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces, and to provide for governing such part of the militia as may be in the service of the United States.

It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments, as well as to the fifth.

Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The States, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces. Thus Massachusetts proposed that "no person shall be tried for any crime by which he would incur an infamous punishment or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land forces." The exception in similar amendments, proposed by New York, Maryland, and Virginia, was in the same or equivalent terms. The amendments proposed by the States were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the States. Among those thus proposed, and subsequently ratified, was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the States. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the State conventions.

We think, therefore, that the power of Congress, in the government of

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the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that government includes protection and defence, as well as the regulation of internal administration? And is it impossible to imagine cases in which citizens, conspiring or attempting the destruction or great injury of the national forces, may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? Congress is but the agent of the nation; and does not the security of individuals against the abuse of this, as of every other power, depend on the intelligence and virtue of the people, on their zeal for public and private liberty, upon official responsibility secured by law, and upon the frequency of elections rather than upon doubtful constructions of legislative powers?

But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.

Congress has the power not only to raise, and support, and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.

In Indiana, for example, at the time of the arrest of Milligan and his co-conspirators, it is established by the papers in the record, that the State was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the State, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the State and national arsenals, armed co-operation with the enemy, and war against the national government.

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We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open, was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.

In Indiana, the judges and officers of the courts were loyal to the government. But it might have been otherwise. In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies.

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that probibition we are satisfied, and should have remained silent, if the answers to the questions certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional, and important to the public safety, — a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President, under whose administration the republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction; one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under *Military Law*, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as *Military Government*, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated *Martial Law Proper*, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise

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and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice Wayne, Mr. Justice Swayne, and Mr. Justice Miller concur with me in these views.

CUMMINGS *v.* THE STATE OF MISSOURI, 4 Wallace, S. C. Rep. 316.

Mr. Justice Field delivered the opinion of the court: —

This case comes before us on a writ of error to the Supreme Court of Missouri, and involves a consideration of the test oath imposed by the constitution of that State. The plaintiff in error is a priest of the Roman Catholic Church, and was indicted and convicted in one of the Circuit Courts of the State of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of five hundred dollars, and to be committed to jail until the same was paid. On appeal to the Supreme Court of the State, the judgment was affirmed.

The oath prescribed by the Constitution, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts, against which it is directed, constitute offences of the highest grade, to which, upon conviction, heavy penalties are attached. Some of the acts have never been classed as offences in the laws of any State, and some of the acts, under many circumstances, would not even be blameworthy. It requires the affiant to deny not only that he has ever "been in armed hostility to the United States, or to the lawful authorities thereof," but, among other things, that he has ever, "by act or word," manifested his adherence to the cause of the enemies of the United States, foreign or domestic, or his *desire* for their triumph over the arms of the United States, or his *sympathy* with those engaged in rebellion, or has ever *harbored* or *aided any person* engaged in guerrilla warfare against the loyal inhabitants of the United States, or has ever *entered* or *left* the State for the purpose of avoiding enrolment or draft in the military service of the United States; or, to escape the performance of duty in the militia of the United States, has ever indicated, *in any terms*, his *disaffection* to the government of the United States in its contest with the rebellion.

Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

And every person holding, at the time the Constitution takes effect, any

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of the offices, trusts, or positions mentioned, is required, within sixty days thereafter, to take the oath; and, if he fail to comply with this requirement, it is declared that his office, trust, or position shall *ipso facto* become vacant.

No person, after the expiration of the sixty days, is permitted, without taking the oath, "to practise as an attorney or counsellor at law, nor after that period can any person be competent, as a bishop, priest, deacon, minister, elder, or other clergyman, of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages."

Fine and imprisonment are prescribed as a punishment for holding or exercising any of "the offices, positions, trusts, professions, or functions" specified, without having taken the oath; and false swearing or affirmation in taking it is declared to be perjury, punishable by imprisonment in the penitentiary.

The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship. If one has ever expressed sympathy with any who were drawn into the rebellion, even if the recipients of that sympathy were connected by the closest ties of blood, he is as unable to subscribe to the oath as the most active and the most cruel of the rebels, and is equally debarred from the offices of honor or trust, and the positions and employments specified.

But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States. On behalf of Missouri, it is urged that they only prescribe a qualification for holding certain offices, and practising certain callings, and that it is therefore within the power of the State to adopt them. On the other hand, it is contended that they are in conflict with that clause of the Constitution which forbids any State to pass a bill of attainder or an *ex post facto* law.

We admit the propositions of the counsel of Missouri, that the States which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty; that they still retain those attributes, except as they have been surrendered by the formation of the Constitution, and the amendments thereto; that the new States, upon their admission into the Union, became invested with equal rights, and were, thereafter, subject only to similar restrictions, and that among the rights reserved to the States is the right of each State to determine the qualifications for office, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction.

These are general propositions, and involve principles of the highest moment. But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the State over matters of

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internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.

Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, office, or employment, or enables him to sustain any character, with success." It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service of the United States and his fitness to teach the doctrines or administer the sacraments of his church; nor can a fact of this kind or the expression of words of sympathy with some of the persons drawn into the rebellion constitute any evidence of the unfitness of the attorney or counsellor to practise his profession, or of the professor to teach the ordinary branches of education, or of the want of business knowledge or business capacity in the manager of a corporation, or in any director or trustee. It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

The disabilities created by the constitution of Missouri must be regarded as penalties — they constitute punishment. We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel does not use these terms — life, liberty, and property — as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10 William III., chap. 32, if any person educated in or having made a profession of the Christian religion, did, "by writing, printing, teaching, or advised speaking," deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offence rendered incapable to hold any office or place of trust; and for the second he was rendered incapable of bringing any action, being

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guardian, executor, legatee, or purchaser of lands, besides being subjected to three years' imprisonment without bail.*

By statute 1, George I., chap. 13, contempts against the king's title, arising from refusing or neglecting to take certain prescribed oaths, and yet acting in an office or place of trust for which they were required, were punished by incapacity to hold any public office; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of Parliament; and the offender was also subject to a forfeiture of five hundred pounds to any one who would sue for the same.†

"Some punishments," says Blackstone, "consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like." ‡

In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, of taking part in family councils, of being guardian or trustee, of bearing arms, and of teaching or being employed in a school or seminary of learning, are punishments prescribed by her code.

The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri constitution being in effect punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendency in that State during the recent rebellion between the friends and the enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present Constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the convention held its deliberations.

It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck*,§ Mr. Chief Justice Marshall, speaking of such action, uses this language: "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the

* 4 Black. 44. † Id. 124. ‡ Id. 377. § 6 Cranch, 137.

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United States contains what may be deemed a bill of rights for the people of each State."

"'No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'"

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

"Bills of this sort," says Mr. Justice Story, "have been most usually passed in England in times of rebellion, or gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."*

These bills are generally directed against individuals by name; but they may be directed against a whole class. The bill against the Earl of Kildare and others, passed in the reign of Henry VIII.,† enacted that "all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said" late earl, and certain other parties, who were named, "in his or their false and traitorous acts and purposes, shall in like wise stand, and be attainted, adjudged, and convicted of high treason;" and that "the same attainder, judgment, and conviction against the said comforters, abettors, partakers, confederates, and adherents, shall be as strong and effectual in the law against them, and every of them, as though they and every of them had been specially, singularly, and particularly named by their proper names and surnames in the said act."

These bills may inflict punishment absolutely, or may inflict it conditionally.

The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be forever banished from the realm; and that if he returned, or was found in England, or in any other of the king's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason; with the proviso, however, that if he surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect.‡

"A British act of Parliament," to cite the language of the Supreme Court of Kentucky, "might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as, convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury."§

If the clauses of the second article of the constitution of Missouri, to which

* Commentaries, § 1344.

† 28 Henry VIII. Chap. 18; 3 Stats. of the Realm, 694.

‡ Printed in 6 Howell's State Trials, p. 391.

§ *Gaines* v. *Buford*, 1 Dana, 510.

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we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty, of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and, therefore, should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they would be no less within the inhibition of the Federal Constitution.

In all these cases there would be the legislative enactment creating the deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath — in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

We proceed to consider the second clause of what Mr. Chief Justice Marshall terms a bill of rights for the people of each State — the clause which inhibits the passage of an *ex post facto* law.

By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.

In *Fletcher* v. *Peck*, Mr. Chief Justice Marshall defined an *ex post facto* law to be one "which renders an act punishable in a manner in which it was not punishable when it was committed." "Such a law," said that eminent judge, "may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime, which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the

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power of seizing for public use the estate of an individual, in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

The act to which reference is here made was one passed by the State of Georgia, rescinding a previous act, under which lands had been granted. The rescinding act, annulling the title of the grantees, did not, in terms, define any crimes, or inflict any punishment, or direct any judicial proceedings; yet, inasmuch as the legislature was forbidden from passing any law by which a man's estate could be seized for a crime, which was not declared such by some previous law rendering him liable to that punishment, the Chief Justice was of opinion that the rescinding act had the effect of an *ex post facto* law, and was within the constitutional prohibition.

The clauses in the Missouri constitution, which are the subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared. They assume that there are persons in Missouri who are guilty of some of the acts designated. They would have no meaning in the constitution were not such the fact. They are aimed at past acts, and not future acts. They were intended especially to operate upon parties who, in some form or manner, by action or words, directly or indirectly, had aided or countenanced the rebellion, or sympathized with parties engaged in the rebellion, or had endeavored to escape the proper responsibilities and duties of a citizen in time of war; and they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations. This deprivation is punishment; nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them there is no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. It is a misapplication of terms to call it anything else.

Now, some of the acts to which the expurgatory oath is directed were not offences at the time they were committed. It was no offence against any law to enter or leave the State of Missouri for the purpose of avoiding enrolment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law — "they impose a punishment for an act not punishable at the time it was committed."

Some of the acts at which the oath is directed constituted high offences at the time they were committed, to which, upon conviction, fine and imprisonment, or other heavy penalties, were attached. The clauses which provide a further penalty for these acts are also within the definition of an *ex post facto* law — "they impose additional punishment to that prescribed when the act was committed."

And this is not all. The clauses in question subvert the presumptions of

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innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way — by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.

The objectionable character of these clauses will be more apparent if we put them into the ordinary form of a legislative act. Thus, if instead of the general provisions in the constitution the convention had provided as follows: Be it enacted, that all persons who have been in armed hostility to the United States shall, upon conviction thereof, not only be punished as the laws provided at the time the offences charged were committed, but shall also be thereafter rendered incapable of holding any of the offices, trusts, and positions, and of exercising any of the pursuits mentioned in the second article of the constitution of Missouri; — no one would have any doubt of the nature of the enactment. It would be an *ex post facto* law, and void; for it would add a new punishment for an old offence. So, too, if the convention had passed an enactment of a similar kind with reference to those acts which do not constitute offences. Thus, had it provided as follows: Be it enacted, that all persons who have heretofore, at any time, entered or left the State of Missouri, with intent to avoid enrolment or draft in the military service of the United States, shall, upon conviction thereof, be forever rendered incapable of holding any office of honor, trust, or profit in the State, or of teaching in any seminary of learning, or of preaching as a minister of the gospel of any denomination, or of exercising any of the professions or pursuits mentioned in the second article of the constitution; — there would be no question of the character of the enactment. It would be an *ex post facto* law, because it would impose a punishment for an act not punishable at the time it was committed.

The provisions of the constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty, without the formality of a judicial trial and conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. The provision of the Federal Constitution, intended to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end, can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the Constitution intended to guard, which may not be effected. Take the case supposed by counsel — that of a man tried for treason and acquitted, or, if convicted, pardoned — the legislature may nevertheless enact that, if the person thus acquitted or pardoned does not take an oath that he never has committed the acts charged against him, he shall not be permitted to hold any office of honor, or trust, or profit, or pursue any avocation in the State. Take the case before us; — the constitution of Missouri, as we have seen, excludes, on failure to take the oath prescribed by it, a large class of persons within her borders from numerous positions and pursuits; it would have been equally within the power of the State to have extended the exclusion so as to deprive the parties, who are unable to take the oath, from any avocation whatever in the State. Take still another case; — suppose that, in

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the progress of events, persons now in the minority in the State should obtain the ascendency, and secure the control of the government; nothing could prevent, if the constitutional prohibition can be evaded, the enactment of a provision requiring every person, as a condition of holding any position of honor or trust, or of pursuing any avocation in the State, to take an oath that he had never advocated, or advised, or supported the imposition of the present expurgatory oath. Under this form of legislation the most flagrant invasion of private rights, in periods of excitement, may be enacted, and individuals, and even whole classes, may be deprived of political and civil rights.

A question arose in New York, soon after the treaty of peace of 1783, upon a statute of that State, which involved a discussion of the nature and character of these expurgatory oaths, when used as a means of inflicting punishment for past conduct. The subject was regarded as so important, and the requirement of the oath such a violation of the fundamental principles of civil liberty, and the rights of the citizen, that it engaged the attention of eminent lawyers and distinguished statesmen of the time, and among others of Alexander Hamilton. We will cite some passages of a paper left by him on the subject, in which, with his characteristic fulness and ability, he examines the oath, and demonstrates that it is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guarantees, secured by the revolution, of the rights and liberties of the people.

"If we examine it" (the measure requiring the oath), said this great lawyer, "with an unprejudiced eye, we must acknowledge, not only that it was an evasion of the treaty, but a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and, instead of obliging the State to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury. . . . It was a mode of inquiry who had committed any of those crimes to which the penalty of disqualification was annexed, with this aggravation, that it deprived the citizen of the benefit of that advantage, which he would have enjoyed by leaving, as in all other cases, the burden of the proof upon the prosecutor.

"To place this matter in a still clearer light, let it be supposed that, instead of the mode of indictment and trial by jury, the legislature was to declare that every citizen who did not swear he had never adhered to the King of Great Britain should incur all the penalties which our treason laws prescribe. Would this not be a palpable evasion of the treaty, and a direct infringement of the Constitution? The principle is the same in both cases, with only this difference in the consequences — that in the instance already acted upon the citizen forfeits a part of his rights; in the one supposed he would forfeit the whole. The degree of punishment is all that distinguishes the cases. In either, justly considered, it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one recognized by the laws and constitution of the State. I mean the trial by jury.

"Let us not forget that the Constitution declares that trial by jury, in all cases in which it has been formerly used, should remain inviolate forever, and that the legislature should at no time erect any new jurisdiction which should not proceed according to the course of the common law. Nothing can be more repugnant to the true genius of the common law than such an inquisition, as has been mentioned, into the consciences of men. . . . If any oath with retrospect to past conduct were to be made the

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condition on which individuals, who have resided within the British lines, should hold their estates, we should immediately see that this proceeding would be tyrannical, and a violation of the treaty; and yet, when the same mode is employed to divest that right, which ought to be deemed still more sacred, many of us are so infatuated as to overlook the mischief.

"To say that the persons who will be affected by it have previously forfeited that right, and that, therefore, nothing is taken away from them, is a begging of the question. How do we know who are the persons in this situation? If it be answered, this is the mode taken to ascertain it — the objection returns — 'tis an improper mode; because it puts the most essential interests of the citizen upon a worse footing than we should be willing to tolerate where inferior interests were concerned; and because, to elude the treaty, it substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law."

Similar views have frequently been expressed by the judiciary in cases involving analogous questions. They are presented with great force in *The Matter of Dorsey*; * but we do not deem it necessary to pursue the subject further.

The judgment of the Supreme Court of Missouri must be reversed, and the cause remanded, with directions to enter a judgment reversing the judgment of the Circuit Court, and directing that court to discharge the defendant from imprisonment, and suffer him to depart without day.

And it is so ordered.

The Chief Justice, and Messrs. Justices Swayne, Davis, and Miller dissented. In behalf of this portion of the court, a dissenting opinion was delivered by Mr. Justice Miller. This opinion applied equally or more to the case of *Ex Parte Garland* (the case next following), which involved principles of a character similar to those discussed in this case. The dissenting opinion is, therefore, published after the opinion of the court in that case.

Ex Parte Garland, 4 Wallace, S. C. Rep. 374.

Mr. Justice Field delivered the opinion of the court.

On the 2d of July, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, except the President, before entering upon the duties of his office, and before being entitled to its salary, or other emoluments. On the 24th of January, 1865, Congress, by a supplementary act, extended its provisions so as to embrace attorneys and counsellors of the courts of the United States. This latter act provides that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after the 4th of March, 1865, to the bar of any Circuit or District Court of the United States, or of the Court of Claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed by the act of July 2, 1862. It also provides that the oath shall be preserved among the files of the court; and if

* 7 Porter, 294.

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any person take it falsely he shall be guilty of perjury, and, upon conviction, shall be subject to the pains and penalties of that offence.

At the December Term, 1860, the petitioner was admitted as an attorney and counsellor of this court, and took and subscribed the oath then required. By the second rule, as it then existed, it was only requisite to the admission of attorneys and counsellors of this court, that they should have been such officers for the three previous years in the highest courts of the States to which they respectively belonged, and that their private and professional character should appear to be fair.

In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of Congress.

In May, 1861, the State of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the State from the Union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the Congress of that Confederacy was received as one of its members.

The petitioner followed the State, and was one of her representatives — first in the lower House, and afterwards in the Senate, of the Congress of that Confederacy, and was a member of the Senate at the time of the surrender of the Confederate forces to the armies of the United States.

In July, 1865, he received from the President of the United States a full pardon for all offences committed by his participation, direct or implied, in the rebellion. He now produces his pardon, and asks permission to continue to practise as an attorney and counsellor of the court without taking the oath required by the act of January 24, 1865, and the rule of the court, which he is unable to take, by reason of the offices he held under the Confederate government. He rests his application principally upon two grounds:

1st. That the act of January 24, 1865, so far as it affects his status in the court, is unconstitutional and void; and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the President.

The oath prescribed by the act is as follows:

1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;

2d. That he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;

3d. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States;

4th. That he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and,

5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same.

This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offences against the criminal laws of the country; others may, or may not, have been offences, according to the circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the crime of treason, and the deponent must declare that he has not been guilty of this crime, not only during the war of the rebellion, but during any period of his life since he has been a citizen.

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The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged in armed hostility to the United States. The third clause applies to the seeking, acceptance, or exercise not only of offices created for the purpose of more effectually carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order, established without their co-operation.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. In the case of *Cummings* v. *The State of Missouri*, just decided, we have had occasion to consider at length the meaning of a bill of attainder and of an *ex post facto* law in the clause of the Constitution forbidding their passage by the States, and it is unnecessary to repeat here what we there said. A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case.

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the

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court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.* Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the Court of Appeals of New York in the matter of the application of Cooper for admission.† "Attorneys and counsellors," said that court, "are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions."

In *Ex Parte Secombe*,‡ a *mandamus* to the Supreme Court of the Territory of Minnesota to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. "We are not aware of any case," said the court, "where a *mandamus* was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act and within the scope of its jurisdiction and discretion." And in the same case the court observed, that "it has been well settled by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of *Cummings* v. *The State of Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." §

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the Presi-

* *Ex parte Heyfron*, 7 Howard, Mississippi, 127; *Fletcher* v. *Daingerfield*, 20 California, 430.

† 22 New York, 81. ‡ 19 Howard, 9. § Article II. § 2.

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dent is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offence of treason, committed by his participation in the rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

The case of R. H. Marr is similar, in its main features, to that of the petitioner, and his petition must also be granted.

And the amendment of the second rule of the court, which requires the oath prescribed by the act of January 24, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded.

And it is so ordered.

Mr. Justice Miller, on behalf of himself and the Chief Justice, and Justices Swayne and Davis, delivered the following dissenting opinion, which applies also to the opinion delivered in *Cummings* v. *Missouri*. (See *supra*, p. 316.)

I dissent from the opinions of the court just announced.

It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who make the laws, both state and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal or essentially modify it.

For the speedy return of that better spirit, which shall leave us no cause

* 4 Blackstone's Commentaries, 402; 6 Bacon's Abridgment, tit. Pardon; Hawkins, book 2, c. 37, §§ 34 and 54.

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for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded.

But the question involved, relating, as it does, to the right of the legislatures of the nation, and of the State, to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

It is at all times the exercise of an extremely delicate power for this court to declare that the Congress of the nation, or the legislative body of a State, has assumed an authority not belonging to it, and by violating the Constitution, has rendered void its attempt at legislation. In the case of an act of Congress, which expresses the sense of the members of a co-ordinate department of the government, as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it, the incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid.

Unable to see this incompatibility, either in the act of Congress or in the provision of the constitution of Missouri, upon which this court has just passed, but entertaining a strong conviction that both were within the competency of the bodies which enacted them, it seems to me an occasion which demands that my dissent from the judgment of the court, and the reasons for that dissent, should be placed on its records.

In the comments which I have to make upon these cases, I shall speak of principles equally applicable to both, although I shall refer more directly to that which involves the oath required of attorneys by the act of Congress, reserving for the close some remarks more especially applicable to the oath prescribed by the constitution of the State of Missouri.

The Constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce the rights of her citizens. Article III., Section 1, of that instrument says that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." Section 8 of Article I. closes its enumeration of the powers conferred on Congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department thereof."

Under these provisions, Congress has ordained and established circuit courts, district courts, and territorial courts; and has, by various statutes, fixed the number of the judges of the Supreme Court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And by the act of 1789, commonly called the Judiciary Act, passed by the first Congress assembled under the Constitution, it is among other things enacted, that "in all the courts of the United States the parties may plead and manage their causes personally; or by the assistance of such counsel or attorneys at law as, by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called variously attorneys, counsellors, solicitors, proctors, and

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other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules, by which persons entitled to become members of this class may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

The right to practise law in the courts as a profession is a privilege granted by the law, under such limitations or conditions in each State or government as the law-making power may prescribe. It is a privilege, and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every State in the Union, and every civilized government, has laws by which the right to practise in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practise law, but the continuance of the right is made, by these laws, to depend upon the continued possession of those qualities.

Attorneys are often deprived of this right, upon evidence of bad moral character, or specific acts of immorality or dishonesty, which show that they no longer possess the requisite qualifications.

All this is done by law, either statutory or common; and whether the one or the other, equally the expression of legislative will, for the common law exists in this country only as it is adopted or permitted by the legislatures, or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress, to the same extent that they are under legislative control in the States, or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that Congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties?

The act which has just been declared to be unconstitutional is nothing more than a statute which requires of all lawyers who propose to practise in the national courts, that they shall take the same oath which is exacted of every officer of the government, civil or military. This oath has two aspects; one which looks to the past conduct of the party, and one to his future conduct; but both have reference to his disposition to support or to overturn the government, in whose functions he proposes to take part. In substance, he is required to swear that he has not been guilty of treason to that government in the past, and that he will bear faithful allegiance to it in the future.

That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most essential qualifications which should be required in a lawyer, seems to me to be too clear for argument. The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been

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powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government, and are every day engaged in aiding in the construction and enforcement of the laws. From among their numbers are necessarily selected the judges who expound the laws and the Constitution. To suffer treasonable sentiments to spread here unchecked, is to permit the stream on which the life of the nation depends to be poisoned at its source.

In illustration of this truth, I venture to affirm, that if all the members of the legal profession in the States lately in insurrection had possessed the qualification of a loyal and faithful allegiance to the government, we should have been spared the horrors of that rebellion. If, then, this qualification be so essential in a lawyer, it cannot be denied that the statute under consideration was eminently calculated to secure that result.

The majority of this court, however, do not base their decisions on the mere absence of authority in Congress, and in the States, to enact the laws which are the subject of consideration, but insist that the Constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the Congress and to the States. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid Congress and the States, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the act of Congress, and the provision of the constitution of the State of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the Constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of Federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English Parliament, that we may learn so much of their peculiar characteristics as will enable us to arrive at a sound conclusion as to what was intended to be prohibited by the Constitution.

The word *attainder* is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our Constitution was framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons *attainted*, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the Constitution were directing their prohibition; for after having, in Article I., prohibited the passage of bills of attainder, — in section nine to Congress, and in section ten to the States, — there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section three of Article III., concerning the judiciary, that, while Congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

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This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government: —

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry.*

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our Constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and *ex post facto* laws, both to Congress and to the States.

It remains to inquire whether, in the act of Congress under consideration (and the remarks apply with equal force to the Missouri constitution), there is found any one of these features of bills of attainder; and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will, therefore, be conceded at once, that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment, are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to. The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere *brutum fulmen*, and the par-

* See Story on the Constitution, § 1344.

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ties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

No person is pointed out in the act of Congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practise law; and as a prerequisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those alone who were engaged in the rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence, or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of Congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in its relation to *ex post facto* laws, that it inflicts no punishment.

A statute, then, which designates no criminal, either by name or description, — which declares no guilt, pronounces no sentence, and inflicts no punishment, — can in no sense be called a bill of attainder.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term, as used in the Constitution, is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of Justice Story, in the case of *Watson* v. *Mercer*,* "*Ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively." †

The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws which come within the meaning of that clause of the Constitution into four classes: —

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2. Every law that aggravates a crime, or makes it greater than it was when committed.

3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offence to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between *ex post facto* laws and retrospective laws," and proceeds to show that, however unjust the latter may be, they are not prohibited by the Constitution, while the former are.

This exposition of the nature of *ex post facto* laws has never been de-

* 8 Peters, 88.

† *Calder* v. *Bull*, 3 Dallas, 386; *Fletcher* v. *Peck*, 6 Cranch, 87; *Ogden* v. *Saunders*, 12 Wheaton, 266; *Satterlee* v. *Matthewson*, 2 Peters, 380.

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nied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all: —

1. That they contemplate the trial of some person charged with an offence.

2. That they contemplate a punishment of the person found guilty of such offence.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offence committed before its passage, or the punishment of any person for such an offence. It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding. It is simply an oath of office, and it is required of all office-holders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law.

No *trial* of any person is contemplated by the act for any past offence. Nor is any party supposed to be charged with any offence in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defence of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the Federal government when they are to be exercised in certain directions, and enlarge them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the Constitution of the United States is held to confer no power on Congress to prevent traitors practising in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the State of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase *ex post facto* laws.

Webster's second definition of the word "punish" is this: "In a loose sense, to afflict with punishment, &c., with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of crime.

And so, in this sense, it is said that whereas persons who had been guilty of the offences mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they

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are by a law passed since these offences were committed, made liable to the enormous additional punishment of being deprived of the right to practise law!

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the government, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practise before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

"Punishment," says Mr. Wharton in his Law Lexicon, "is the penalty for transgressing the laws;" and this is, perhaps, as comprehensive and at the same time as accurate a definition as can be given. Now, what law is it whose transgression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offence described in any other act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property.

In fact the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto*.

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson* v. *Mercer*, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The State, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And, if not, in what does it differ from one? Just in the same manner that the act of Congress does, namely, that the proceeding is civil, and not criminal, and that the imprisonment in the one case and the prohibition to practise law in the other are not punishments in the legal meaning of that term.

The civil law maxim, "*Nemo debet bis vexari pro una et eadam causa*," has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the Constitution incorporates this principle into that instrument so far as punishment affects life or limb. It results from this rule that no man can be twice lawfully punished for the same offence. We have already seen that the acts of which

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the party is required to purge himself on oath constitute the crime of treason. Now, if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet, if the applicant here should afterwards be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial nor punishment within the legal meaning of these terms.

I maintain that the purpose of the act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is contended by the majority that no requirement can be justly said to be a qualification which is not attainable by all, and that to demand a qualification not attainable by all is a punishment.

The Constitution of the United States provides as a qualification for the offices of President and Vice-President that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The constitutions of nearly all the States require as a qualification for voting that the voter shall be a *white male* citizen. Is this a punishment for all the blacks, who can never become white?

Again, it was a qualification required by some of the State constitutions, for the office of judge, that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the State of New York, was deprived of that office by this provision of the constitution of that State; and he was thus, in the midst of his usefulness, not only turned out of office, but he was forever disqualified from holding it again, by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbid by law to practise in the courts; yet no one ever thought the law was *ex post facto* in the sense of the Constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed, — the darkest hour of our great struggle, — the necessity for its existence, the humane character of the President who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defence, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offences.

I think I have now shown that the statute in question is within the legislative power of Congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law.

If I am right on the questions of qualification and punishment, that discussion disposes also of the proposition, that the pardon of the President relieves the party accepting it of the necessity of taking the oath, even if the law be valid.

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I am willing to concede that the presidential pardon relieves the party from all the penalties, or, in other words, from all the punishment, which the law inflicted for his offence. But it relieves him from nothing more. If the oath required as a condition to practising law is not a punishment, as I think I have shown it is not, then the pardon of the President has no effect in releasing him from the requirement to take it. If it is a qualification which Congress had a right to prescribe as necessary to an attorney, then the President cannot, by pardon or otherwise, dispense with the law requiring such qualification.

This is not only the plain rule as between the legislative and executive departments of the government, but it is the declaration of common sense. The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but is not thereby restored to the qualifications which are essential to admission to the bar. No doubt it will be found that very many persons among those who cannot take this oath, deserve to be relieved from the prohibition of the law; but this in no wise depends upon the act of the President in giving or refusing a pardon. It remains to the legislative power alone to prescribe under what circumstances this relief shall be extended.

In regard to the case of *Cummings* v. *The State of Missouri*, allusions have been made, in the course of argument, to the sanctity of the ministerial office, and to the inviolability of religious freedom in this country.

But no attempt has been made to show that the Constitution of the United States interposes any such protection between the State governments and their own citizens. Nor can anything of this kind be shown. The Federal Constitution contains but two provisions on this subject. One of these forbids Congress to make any law respecting the establishment of religion, or prohibiting the free exercise thereof. The other is, that no religious test shall ever be required as a qualification to any office or public trust under the United States.

No restraint is placed by that instrument on the action of the States; but on the contrary, in the language of Story,* "the whole power over the subject of religion is left exclusivelyt o the State governments, to be acted upon according to their own sense of justice and the State constitutions."

If there ever was a case calling upon this court to exercise all the power on this subject which properly belongs to it, it was the case of the Rev. B. Permoli.

An ordinance of the first municipality of the city of New Orleans imposed a penalty on any priest who should officiate at any funeral, in any other church than the obituary chapel. Mr. Permoli, a Catholic priest, performed the funeral services of his church over the body of one of his parishioners, enclosed in a coffin, in the Roman Catholic Church of St. Augustine. For this he was fined, and relying upon the vague idea advanced here, that the Federal Constitution protected him in the exercise of his holy functions, he brought the case to this court.

But hard as that case was, the court replied to him in the following language: "The Constitution [of the United States] makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States."† Mr. Permoli's writ of error was, therefore, dismissed for want of jurisdiction.

* Commentaries on the Constitution, § 1878.

† 3 Howard, 589.

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In that case an ordinance of a mere local corporation forbade a priest, loyal to his government, from performing what he believed to be the necessary rites of his church over the body of his departed friend. This court said it could give him no relief.

In this case the constitution of the State of Missouri, the fundamental law of the people of that State, adopted by their popular vote, declares that no priest of any church shall exercise his ministerial functions, unless he will show, by his own oath, that he has borne a true allegiance to his government. This court now holds this constitutional provision void, on the ground that the Federal Constitution forbids it. I leave the two cases to speak for themselves.

In the discussion of these cases I have said nothing, on the one hand, of the great evils inflicted on the country by the voluntary action of many of those persons affected by the laws under consideration; nor, on the other hand, of the hardships which they are now suffering, much more as a consequence of that action than of any laws which Congress can possibly frame. But I have endeavored to bring to the examination of the grave questions of constitutional law involved in this inquiry those principles alone which are calculated to assist in determining what the law is, rather than what, in my private judgment, it ought to be.

THE STATE OF MISSISSIPPI *v.* JOHNSON, 4 Wallace, S. C. Rep. 497.

The Chief Justice delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2 and March 23, 1867, commonly known as the Reconstruction Acts.

The Attorney General objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be

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required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

The case of *Marbury* v. *Madison, Secretary of State,** furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the Secretary of State. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

So, in the case of *Kendall, Postmaster General,* v. *Stockton & Stokes,*† an act of Congress had directed the Postmaster General to credit Stockton & Stokes with such sums as the Solicitor of the Treasury should find due to them; and that officer refused to credit them with certain sums, so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced.

In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus.*

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it.

Had it been supposed at the bar that this court would, in any case, interpose, by injunction, to prevent the execution of an unconstitutional act of Congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it.

Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of States and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular States. But no one seems to have thought of an application for an injunction against the execution of the act by the President.

* 1 Cranch, 137.

† 12 Peters, 527.

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And yet it is difficult to perceive upon what principle the application now before us can be allowed, and similar applications in that and other cases have been denied.

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that Congress can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves.

It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties, and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

The motion for leave to file the bill is, therefore, denied.

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THE PETERHOFF, 5 Wallace, 60. (1866.)

Political status of persons residing in rebel States during the war.

Two other questions remain to be disposed of. The first of these relates to the political status of Redgate, one of the owners of the cargo. It was insisted, in the argument for the government, that this person was an enemy, and that the merchandise owned by him was liable to capture and confiscation as enemy's property.

It appears that he was by birth an Englishman; that he became a citizen of the United States; that he resided in Texas at the outbreak of the rebellion; made his escape; became a resident of Matamoras; had been engaged in trade there, not wholly confined, probably, to Mexico; and was on his return from England with a large quantity of goods, only a small part of which, however, was his own property, with the intention of establishing a mercantile house in that place.

It has been held, by this court, that persons residing in the rebel States at any time during the civil war, must be considered as enemies, during such residence, without regard to their personal sentiments or dispositions.* But this has never been held in respect to persons faithful to the Union, who have escaped from those States, and have subsequently resided in the loyal States, or in neutral countries. Such citizens of the United States lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country. And to this class Redgate seems to have belonged. He cannot therefore be regarded as an enemy. If his property was liable to seizure at all, on account of his political character, it was as property of a citizen of the United States proceeding to a State in insurrection. But we see no sufficient ground for distinguishing that portion of the cargo owned by him, as to destination, from any other portion.

THE GRAY JACKET, 5 Wallace, 369. (1867.)

This was a case of maritime capture of a vessel and cargo, seized *flagrante delicto*, while running the blockade then declared against our southern coast. The court say, —

The liability of the property is irrespective of the *status domicilii*, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is, nevertheless, as much liable to condemnation as if owned by a citizen or subject of the hostile country, or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it. Such, with this limitation, is the settled law of this and of all other prize courts.

* Prize Cases, 2 Black. 666, 687, 688; *The Venice*, 2 Wallace, 258; *Mrs. Alexander's Cotton*, Id. 404.

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THE WILLIAM BAGALEY, 5 Wallace, 402–409. (1866.)

The steamer and cargo were captured as prize of war on the 18th day of July, 1863; and having been duly libelled and prosecuted as such, in the District Court on the 17th day of August following, they were both condemned as forfeited to the United States. Monition was duly published, but no one appeared as claimant, either for the steamer or cargo. Directions of the decree of condemnation were, that the steamer and cargo, after ten days' public notice, should be sold by the marshal, and that the proceeds of the sale should be deposited in the registry of the court, for distribution according to law. Return of the marshal shows that the notice was duly given, and that the sale was made as directed by the decree. Proceeds of the sale were paid to the marshal, but before the amount was actually deposited in the registry of the court the appellant filed his petition of intervention, claiming one sixth of the proceeds, upon the ground that he was the true and lawful owner of one sixth part of the vessel and cargo. Allegations of the petition of intervention were, in substance and effect, as follows: —

1. That the petitioner was, and for many years had been, a citizen of the State of Indiana; that at the breaking out of the rebellion he was a member of the firm of Cox, Brainard & Co., at Mobile, Alabama; that the partners of the firm, as such, were the sole owners of the steamer and cargo; and that he had never parted with his share, or in any way transferred his interest in the partnership.

2. That the steamer, after the rebellion broke out, to the time of the capture, was contiunally in the waters of the rebellious States, and under the control and management of those engaged in the rebellion, which rendered it impracticable and unlawful for him to proceed to the place where the steamer was, or to exercise any control over the steamer, or any part of the partnership property.

3. That he was, and always had been, a true and loyal citizen; that he had never given any aid, encouragement, or assistance to the rebellion, and that he had no connection with, or knowledge of, the unlawful voyage of the steamer, on account of which she was condemned as lawful prize.

4. That some court of the Confederate States, so called, at some time in the year 1862, had condemned and confiscated his interest in the partnership; but he averred that the decree was wholly nugatory and void, and that his interest in the steamer and cargo had never been extinguished or destroyed.

Basing his claim upon these allegations of fact, he prayed that he might be paid, out of the proceeds of the sale, one sixth of the amount required to be paid into the registry of the court.

Exceptions were filed to the petition of intervention, but they were overruled by the court, and the District Attorney appeared and admitted that all the facts therein alleged were true. Parties were heard as upon an agreed statement, and the District Court entered a decree that the intervention and claim of the petitioner be rejected and dismissed with costs. Appeal was taken by the intervenor from that decree, and he now seeks to reverse it, upon the ground that he, as owner of one sixth part of the steamer and cargo, is entitled to one sixth of the proceeds of the sale.

1. Captors contend that the steamer and cargo were both rightfully condemned as enemy property, and also for breach of blockade. Appellant denies the entire proposition as respects his interest in the captured property, and insists that the one sixth of the same belonging to him cannot properly be condemned on either ground, because he was never domiciled in

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the rebellious States, and because he never employed the property, either actually or constructively, in any illegal trade with the enemy, or in any attempt to break the blockade.

The projected voyage of the steamer was from Mobile to Havana, and the master testifies that she sailed under the Confederate flag. Proofs show that she left her anchorage in the night time, and that she was captured, as alleged in the libel, after a brisk chase by several of our blockading squadron, more than two hundred miles from the port of departure. When captured, she had on board a permanent register, issued at Mobile under Confederate authority, and which described her owners as trustees of a certain association, and citizens of the Confederate States.

The testimony of the master showed that the cargo, which consisted of seven hundred bales of cotton, three thousand two hundred staves, and one hundred and twenty-five barrels of turpentine, was consigned to parties in Havana, and that the shipment was for the benefit of owners residing at the home port. Except an informal manifest, the steamer had no papers on board relating to the cargo, and the master testified that she carried none for the consignee, "for fear of being captured." He was appointed by the trustees, and he also testified that his instructions were to elude the blockading vessels if possible, but not to resist in case he was unable to escape. The ship's company consisted of thirty men, and all the officers and crew, with one exception, were citizens of the enemy country. Direct admission is made by the master, in his testimony, that he stole out of the harbor, and that the steamer and cargo were captured for breach of blockade. Such an admission was hardly necessary to establish the charge, as every fact and circumstance in the case tended to the same conclusion. Five sixths of the steamer and cargo were confessedly enemy property, and the whole adventure was projected and prosecuted for the benefit of resident enemy owners. None of these facts are controverted by the appellant; but he insists that, inasmuch as he was domiciled in a loyal State, and had no connection with the adventure or the voyage, his interest cannot properly be held liable to capture.

2. War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the laws of nations, to make prize of the ships, goods, and effects of each other upon the high seas. Property of the enemy, if at sea, may be captured as prize of war; but the property of a friend cannot be lawfully captured, provided he observes his neutrality. Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign, to the subjects or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country.* Neutral friends, or even citizens, who remain in the enemy country after the declaration of war, have impressed upon them so much of the character of enemies, that trading with them becomes illegal, and all property so acquired is liable to confiscation.†

Part owners of ships are seldom partners, in the commercial sense, because no one can become the partner of another without his consent, and because, if they acquire title by purchase, they usually buy distinct shares, at different times and under different conveyances; and even when they are the builders, they usually make separate contributions for the purpose. Generally speaking, they are only tenants in common; but the steamer, in this case, belonged to the partnership, and throughout the rebellion, to the time of

* *Jecker* v. *Montgomery*, 13 Howard, 498.

† *The Hoop*, 1 Robinson, 196; Maclachlan on Shipping, 473; *The Rapid*, 8 Cranch, 155; *Potts* v. *Bell*, 8 Term, 561; Wheaton's International Law, by Lawrence, 547.

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capture, was controlled and managed by the partners in the enemy country.*

Even where the part-owners of a ship are tenants in common, the majority in interest appoint the master and control the ship, unless they have surrendered that right by agreeing in the choice of a ship's husband as managing owner.†

Admiralty, however, in certain cases, if no ship's husband has been appointed, will interfere to prevent the majority from employing the ship against the will of the minority without first entering into stipulation to bring back the ship or pay the value of their shares. But the dissenting owners, in such a case, bear no part of the expenses of the voyage objected to, and are entitled to no part of the profits.

Such are the general rules touching the employment and control of ships; but unless the co-owners agree in the choice of a managing owner, or the dissenting minority go into admiralty, the majority in interest control the employment of the ship, and appoint the master.‡ Tenants in common of a ship can only sell their own respective shares, but where the ship belongs to a partnership, one partner may sell the whole ship.§

3. Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict, by proclamation, all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States.‖ The provision of the sixth section of the act is, that after fifteen days from the issuing of such proclamation, any ship or vessel belonging in whole or part to any citizen or inhabitant of a State or part of a State, whose inhabitants shall be so declared to be in insurrection, if found at sea or in the port of any loyal State, may be forfeited. Reference is made to those provisions, as showing that our citizens were duly notified that Congress, as well as the President, had recognized the undeniable fact that civil war existed between the constitutional government and the Confederate States; and that seasonable notice was given to all whose interests could be affected, and that ample opportunity and every facility were extended to them, which could properly be granted, to enable them to withdraw their effects from the States in rebellion, or to dispose of such interests as in the nature of things could not be removed.

Open war had existed between the belligerents for more than two years before the capture in this case was made, and yet there is not the slightest evidence in the record that the appellant ever attempted, or manifested any desire, to withdraw his effects in the partnership, or to dispose of his interest in the steamer. The effect of the war was to dissolve the partnership, and the history of that period furnishes plenary evidence that ample time was afforded, to every loyal citizen desiring to improve it, to withdraw all such effects and dispose of all such interests. "Partnership with a foreigner," says Maclachlan, "is dissolved by the same event which makes him an alien enemy;" and Judge Story says, that "there is, in such cases, an utter incompatibility, created by operation of law, between the partners, as to their respective rights, duties, and obligations, both public and private,

* *Helme* v. *Smith*, 7 Bingham, 709.

† Smith's Mercantile Law, 6th ed. 197.

‡ Maude and Pollock on Shipping, 67, 72.

§ 3 Kent's Com. 11th ed. 154; *Wright* v. *Hunter*, 1 East. 20; *Lamb* v. *Durant*, 12 Mass. 54.

‖ 12 Stat. at Large, 1258, 257.

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and therefore that a dissolution must necessarily result therefrom, independent of the will or acts of the parties." *

Executory contracts with an alien enemy, or even with a neutral if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end, and for that purpose with a force equivalent to that of an act of Congress.†

The duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable, and adhere to the regular established government. Domicile, in the law of prize, becomes an important consideration, because every person is to be considered in such proceedings as belonging to that country where he has his domicile, whatever may be his native or adopted country. ‡

4. Personal property, except such as is the produce of the hostile soil, follows, as a general rule, the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy.

The presumption of the law of nations is against one who lingers in the enemy's country, and if he continues there for much length of time, without satisfactory explanations, he is liable to be considered as *remorant*, or guilty of culpable delay, and an enemy. §

Ships purchased from an enemy by such persons, though claimed to be neutral, are for the same reasons liable to condemnation, unless the delay of the purchaser in changing his domicile is fully and satisfactorily explained. Omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious State, are attempted to be explained and justified, because the same were, as alleged in the petition, confiscated during the rebellion, under the authority of the rebel government. More than a year, however, had elapsed, after the proclamation of blockade was issued, before any such pretended confiscation took place. Members of a commercial firm domiciled in the enemy country, whether citizens or neutrals, after having been guilty of such delay in disposing of their interests or in withdrawing their effects, cannot, when the property so domiciled and so suffered to remain is captured as prize of war, turn round and defeat the rights of the captors, by proving that their own domicile was that of a friend, or that they had no connection with the illegal voyage.

Property suffered so to remain has impressed upon it the character of enemy property, and may be condemned as such or for breach of blockade. Prize courts usually apply these rules where the partnership effects of citizens or neutrals is suffered to remain in the enemy country, under the control and management of the other partners, who are enemies. But there are other rules applicable to ships owned under such circumstances which must not be overlooked in this case.

* Maclachlan on Shipping, 475; Story on Partnership, § 316; *Griswold* v. *Waddington*, 15 Johnson, 57; same case, 16 Id. 438.

† *Exposito* v. *Bowden*, 7 Ellis and Blackburne, 763.

‡ *The Vigilantia*, 1 C. Robinson, 1; *The Venus*, 8 Cranch, 288; 3 Phillimore's International Law, 128.

§ Maclachlan on Shipping, 480; *The Ocean*, 5 Robinson, 91; *The Venus*, 8 Cranch, 278.

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MAURAN *v.* INSURANCE COMPANY, 6 Wallace, 14. (1867–8.)

The chief point in this case is well stated by Mr. Wallace, the excellent Reporter of the Supreme Court, thus: —

"A taking of a vessel by the naval forces of a now extinct rebellious confederation, whose authority was unlawful, and whose proceedings in overthrowing the former government were wholly illegal and void, and which confederation has never been recognized as one of the family of nations, is a 'capture' within the meaning of a warranty on a policy of insurance having a marginal warranty, 'Free from loss or expense by capture' — if such rebellious confederation was at the time sufficiently in possession of the attributes of government to be regarded as in fact the ruling or supreme power of the country over which its pretended jurisdiction extended, and if it had been substantially, though informally, treated as a belligerent by our government. Accordingly, a seizure by a vessel of the late so-called Confederate States of America, for their benefit, was a capture within the terms of such a warranty."

The court say, —

The Constitution of the United States, which is the fundamental law of each and all of them, not only afforded no countenance or authority for these proceedings (the organization of a rebel confederacy), but they were in every part of them in express disregard and violation of it. Still it cannot be denied but that, by use of these unlawful and unconstitutional means, a government in fact was erected greater in territory than many of the old governments of Europe, complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions, and during all which time the exercise of many belligerent rights were either conceded to it, or were acquiesced in by the supreme government, such as the treatment of captives, both on land and sea, as prisoners of war; the exchange of prisoners; their vessels captured recognized as prizes of war, and dealt with accordingly; their property seized on land referred to the judicial tribunal for adjudication; their ports blockaded, and the blockade maintained by a suitable force, and duly notified to neutral powers, the same as in open and public war. We do not inquire whether these were rights conceded to the enemy by the laws of war among civilized nations, or were dictated by humanity to mitigate the vindictive passions growing out of a civil conflict. We refer to the conduct of the war as a matter of fact, for the purpose of showing that the so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as in possession of the country; and hence captures under its commission were among those excepted out of the policy by the warranty of the insured. We could greatly extend the opinion upon this branch of the case, by considerations in support of the above view; but the question has undergone very learned and able examinations in several of the State courts deservedly of the highest eminence, and which have arrived at the same conclusion, and to which we refer as rendering further examination unnecessary.*

Chief Justice and Swayne, J., dissenting.

* *Dole* v. *New England Mutual Insurance Company*, 6 Allen, 373; *Fifield* v. *Insurance Company*, 47 Penn. State. 166; *Dole* v. *Merchants' Mutual Insurance Company*, 51 Maine, 464.

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STATE OF GEORGIA *v.* STANTON, 6 Wallace, 63.

In this case the counsel for the State of Georgia said, —

The Attorney General quite understates the effects of these Reconstruction Acts. Their actual effect is to restrain at once the holding of any election within the State for any officers of the present State government by any of the State authorities; to direct all future elections in the State to be held under the direction of, and by officers appointed by, the military commander; and that all persons of certain classes described shall be the electors permitted to vote at such election. It is, therefore, an immediate paralysis of all the power and authority of the State government by military force; a plain setting aside of the present State government, and depriving it of the necessary means of continuing its existence. It is substituting in its place a new government, created under a new constitution, and elected by a new and independent class of electors.

What is the effect of this upon the State government and upon the State now existing? The same, just, as if in the case of a private corporation (which could only keep up its existence by regular periodical elections by its stockholders), — the persons having an interest in it, the owners of its franchise, and the right to perpetuate it, were forbidden to vote, deprived of the right, — or a large number of them were so forbidden and deprived; and a mass of persons, having no right whatever, were introduced. This is a direct attack upon the constitution of the corporation in the case supposed; a direct attack upon the constitution and fundamental law of the State in the case before the court.

To grant an injunction in such a case is manifestly within the jurisdiction of equity.*

The grievance of which Georgia complains is analogous; a proceeding to divest her of her legally and constitutionally established and guaranteed existence as a body politic and a member of the Union.

To explain. By the fundamental law of Georgia, as we know, its constituent body is, and always has been, composed of the "free white male citizens of the State, of the age of twenty-one years, who have paid all taxes which may have been required of them, and which they have had an opportunity of paying agreeably to law for the year preceding the election, being citizens of the United States, and having resided six months either in the district or county, and two years within the State." †

A State is a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests. It has its rules. It has its rights.‡ A republican State, in every political, legal, constitutional, and judicial sense, as well under the law of nations as the laws and usages of the mother country, is composed of those persons who, according to its existing constitution or fundamental law, are the constituent body. All other persons within its territory, or socially belonging to its people, as a human society, are subject to its laws, and may justly claim its protection; but they are not, in contemplation of law, any portion of the body politic known and recognized as the State. On principle it

* *Ward* v. *The Society of Attorneys*, 1 Collyer's New Cases in Chancery, 379; *Simpson* v. *Westminster Palace Hotel Company*, 8 Clark (House of Lord's Cases), 717; *Dodge* v. *Woolsey*, 18 Howard, 341.

† Constitution of Georgia, 1865, Art. V. Sec. 1.

‡ *Chisholm* v. *Georgia*, per Wilson, J., 2 Dallas, 45.

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must be quite clear that the body politic is composed of those who by the fundamental law are the source of all political power, or official or governmental authority. Dorr's revolutionary government in Rhode Island was an attempted departure from it.* In that case the precise thing was done by Dorr and his adherents which these acts in the present instance seek to perform.

There was a State government in the hands of a portion of the people of that State, constituting its whole electoral body. Dorr was of opinion, and his adherents supported him in it, that a greater number of electors ought to be admitted; and he thereupon undertook, by spontaneous meeting, to erect an independent State government. He failed in so doing. The court decided that it was no government, but that the original chartered government which there existed was the legitimate and lawful government, and consequently Dorr failed. The same reasons would lead to the overthrow of these acts of Congress. The State has a right to maintain its constitution or political association; and it is its duty to do what may be necessary to preserve that association; and no external power has a right to interfere with or disturb it.† In *Rhode Island* v. *Massachusetts*,‡ this court says, that "the members of the American family [meaning the States] possess ample means of defence under the Constitution, which we hope ages to come will verify." What means of defence under the Constitution is possessed by Georgia, if this suit cannot be maintained?

The change proposed by the two acts of Congress in question is fundamental and vital. The acts seize upon a large portion — whites — of the constituent body, and exclude them from acting as members of the State. It violently thrusts into the constituent body, as members thereof, a multiude of individuals — negroes — not entitled by the fundamental law of Georgia to exercise political powers. The State is to be Africanized. This will work a virtual extinction of the existing body politic, and the creation of a new, distinct, and independent body politic, to take its place and enjoy its rights and property. Such new State would be formed, not by the free will or consent of Georgia or her people, nor by the assent or acquiescence of her existing government or magistracy, but by external force. Instead of keeping the guarantee against a forcible overthrow of its government by foreign invaders or domestic insurgents, this is destroying that very government by force. Should this be done, and the magistracy of the new State be placed in possession, the very recognition of them by the Congress and President, who thus set them up, would be a conclusive determination, as between such new government and the State government now existing. This court would be, then, bound to recognize the latter as lawful.§ Independently of this principle, the forced acquiescence of the people, under the pressure of military power, would soon work a virtual extinction of the existing political society. Each aspect of the case shows that the impending evil will produce consequences fatal to the continuance of the present State, and, consequently, that the injury would be irreparable.

The court say, —

The distinction (between political and judicial matters) results from the organization of the government into three great departments, executive, legislative, and judicial, and from the assignment and limitation of the

* *Luther* v. *Borden*, 7 Howard, 1.

† Vattel's Law of Nations, book 1, chap. 2, § 16; Id. book 2, chap. 4, § 57.

‡ 12 Peters, 745.

§ *Buther* v. *Borden*, 7 Howard, 1.

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powers of each by the Constitution. The judicial power is vested in one Supreme Court, and in such inferior courts as Congress may ordain and establish; the political power of the government in the other two departments. The distinction between judicial and political power is so generally acknowledged, in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction.

Nabob of Carnatic v. *The East India Company*, 1 Vesey, Jr., 375–393. S. C. 2 Id. 56–60.

Penn v. *Lord Baltimore*, 1 Vesey, 446–7.

New York v. *Connecticut*, 4 Dallas, 4–6.

The Cherokee Nation v. *Georgia*, 5 Peters, 1, 20, 29, 30, 51, 75.

The State of Rhode Island v. *The State of Massachusetts*, 12 Ib. 657, 733, 734, 737, 738.

By the second section of the third article of the Constitution, "the judicial power extends to all cases in law and equity arising under the Constitution, the laws of the United States, &c., and, as applicable to the case in hand, to controversies between a State and citizens of another State," — which controversies, under the Judiciary Act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction; and we agree, that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, when the danger, actual or threatened, is irreparable, or the remedy at law inadequate; but according to the course of proceeding under this head, in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights, which do not belong to the jurisdiction of a court either in law or equity.

The remaining question on this branch of our inquiry is whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul, and totally abolish, the existing State government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all means and instrumentalities whereby its existence might, and otherwise would, be maintained. That these both, as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions and upon rights not of persons and property, but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed or in danger of actual or threatened infringement, is presented by the bill in a judicial form for the judgment of the court.

Having arrived at the conclusion that this court, for the reasons above stated, possess no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

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HENRY P. COOLIDGE *v.* COLUMBUS GUTHRIE.

Circuit Court of the United States, Southern District of Ohio, October Term, 1868.

Swayne, J. This is an action of trover, brought to recover the value of the cotton mentioned in the plaintiff's declaration. The defendant pleaded the general issue. The parties submitted the cause to the Court — waiving the intervention of a jury.

According to the statute regulating the practice in such cases, "the finding of the court upon the facts — which finding may be either general or special — shall have the same effect as the finding of a jury." . . . "When the finding is special, the review" (by the Supreme Court of the United States) "may extend to the sufficiency of the facts found to support the judgment." (Act of March 3, 1865, Chap. 86, Sect. 4, 13 Stat. 501.) As this case is an important one in the principles which it involves, it is deemed proper to find the facts specially, in order that the decision of this court may be reviewed more conveniently by the higher court, if such a review shall be desired by the party against whom our judgment is about to be given.

The facts are accordingly found upon the evidence before us, as follows: —

1. On the 12th of July, 1862, General Samuel R. Curtis, commanding an army of the United States, took military possession of the town of Helena, in the State of Arkansas. That State was then in rebellion against the United States.

2. The cotton was all raised upon farms belonging to General Gideon J. Pillow, who was, at the time of the seizure of the cotton, in the military service of the rebel government. The farms were in the immediate vicinity of Helena.

3. General Curtis ordered the cotton in controversy to be seized and brought into Helena; and it was seized and brought there accordingly. The wagons conveying it were protected by troops detailed for that purpose.

4. He sold and delivered the cotton to the defendant and one William W. Babcock, jointly. There were two sales — one of two hundred bales, and one of thirty-six bales. Both sales were made at Helena, on the 26th of July, 1862. The agreed price was fourteen and a half cents per pound. The average weight of the bales was four hundred pounds.

5. Subsequently, the defendant, Guthrie, delivered eighty-two bales of the cotton to Alfred Spink, at Memphis, pursuant to the order of a quartermaster of the army. Spink paid Guthrie forty-five dollars per bale for the cotton, so delivered. Fourteen bales more of the cotton were taken by a gunboat, to be used, as was alleged, for calking purposes. The residue, consisting of one hundred and forty bales, was shipped by the defendant to the city of New York, and there sold.

6. General Curtis alleged, at the time of the seizure and sale of the cotton, that his object was to apply the proceeds to the support of the starving negro population in the neighborhood of his camp. A small part of the proceeds were so applied. He received full payment for the cotton at the contract price. He never reported the seizure and sale to the authorities at Washington, nor to any other public officer, and died without having accounted for the proceeds to any one.

7. When the defendants bought the cotton, it had been for several days at Helena in the military possession of General Curtis. It was in a damaged condition. The navagation of the Mississippi was at that time attended with peril to life and property. Babcock was killed at a landing

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twenty miles below Memphis, by guerrillas, on the 20th of October, 1862. The value of the cotton at the time and place of purchase was fourteen and a half cents per pound — what the defendant and Babcock paid for it. The whole quantity of the cotton purchased and received by the defendant and Babcock was ninety-four thousand four hundred pounds. The legal title and ownership of the cotton at the time of its seizure by General Curtis was in the plaintiff, Coolidge. He was a resident of Arkansas, but was in no wise engaged in the rebellion. All the facts relating to the cotton were known to the defendant and Babcock when they purchased.

Opinion.

The plaintiff is entitled to recover unless the grounds of defence relied upon by the defendant shall be found sufficient to protect him. If liable, the measure of his liability is the value of the entire amount of the cotton which he received, at fourteen and a half cents per pound, with interest from the 20th day of July, 1862, the time of the alleged conversion. If he was then guilty of an illegal and wrongful act touching the cotton, his liability was fixed at that time, and the subsequent delivery to another of eighty-two bales, upon the order of the quartermaster, and the taking of fourteen bales by the gunboat, can have no retroactive operation, or in any wise affect the amount for which he must respond. Where property is tortiously taken, every one who receives it and exercises acts of ownership over it is guilty of a conversion, and is liable for its full value, without reference to the liability of others through whose hands it may also have passed, either before or after the conversion by the defendant. (*Williams & Chapin* v. *Marle*, 11 Wend., 81.)

In the eye of the law, the order of the quartermaster and the act of the gunboat are immaterial facts in the case, and may be laid out of view.

Two defences are relied upon by the defendant, Guthrie.

1. That this court has no jurisdiction of the case.

2. That as soon as General Curtis acquired a firm possession of the property, by having it conveyed *infra presidia*, the title of the plaintiff became *ipso facto* extinguished, and a complete title vested in the United States; and that, if the plaintiff has any rights left in respect to the cotton, they must be assessed against the United States, and that he has none which can be enforced against the defendant.

When the transaction occurred the rebellion had risen to the proportions of a civil war, and was fully flagrant. Arkansas was enemy's territory, and all the property there was enemy property. Cotton was an article of foreign and domestic commerce. It was one of the main sinews of the power of the insurgents. They relied upon it for the purchase of arms and other munitions of war, and chiefly to supply them with financial means for the prosecution of the strife. Important belligerent rights were conceded to them by the government of the nation. Their soldiers, when captured, were treated as prisoners of war. They were exchanged, and not held for treason. Their vessels, when captured, were dealt with by our prize courts. Their ports were blockaded, and the blockades proclaimed to neutral powers, and property found on board such vessels, belonging to persons residing in the rebel States, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign power. (*The Prize Cases*, 2 Black. 687; *Mrs. Alexander's Cotton*, 2 Wallace, 417; *Mauran* v. *Insurance Company*, 6 Wallace, 1.)

No act of Congress had then been passed which affects the case. No regulations issued by any department of the government prior to that time,

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relating to the subject, have been brought to our attention. The acts of August 6, 1861, and of July 17, 1862, have no application.

General Curtis and his army are to be regarded, for the purposes of this case, as if prosecuting hostilities in a foreign country with which the United States were at war, and the case is to be decided upon the principles of law applicable in that condition of things.

1. In respect to the defence first mentioned, the inquiry arises whether it should not have been presented by a special plea, and whether it can be considered under the general issue.

The question is the same whether a seizure *jure belli* be made upon land or water. The case of *Lecaux* v. *Eden* (2 Douglas, 594) was of the latter class. The vessel had been restored and the captors condemned in costs and damages by a decree of the Prize Court. It was held upon the fullest consideration that the defence was admissible under the general issue. The grounds of the judgment were, that the capture of the vessel and the imprisonment of the crew were not trespasses by the common law; that if wrongs had been committed, they were triable only by the law of nations, and that no municipal court had authority to adjudicate upon the subject.

Such was the unanimous judgment of the court. If there were no trespasses by the common law there, *a multo fortiori*, there was by the common law, here, no conversion.

In *Lindo* v. *Rodney* (2 Douglas, 613), the point of pleading was not raised, but the same doctrine of the want of jurisdiction in the courts of common law was affirmed by Lord Mansfield in a learned and elaborate judgment.

In *Elphinstone* v. *Bedreechund*, the seizure was by a military force on land. A judgment had been rendered by the Supreme Court of Bombay, from which an appeal was taken. Lord Tenterden, delivering the opinion of the Privy Council, said, —

"We think the character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello* — regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject; but that if anything was done amiss, recourse could only be had to the government for redress. We shall, therefore, recommend to his Majesty to reverse the judgment." (1 Knapp's P. C. R. 300.)

"It should also be observed that according to the English law, which, in this respect, is in accordance with the principles of general law and public jurisprudence, no action can be maintained in a court of municipal law against the captor of booty or prize. If an English naval commander seizes property as belonging to the enemy, which turns out clearly to be British property; he forfeits his prize in the Court of Admiralty, and that court awards the return of it to the party from whom it was taken; but the case of *Lecaux* v. *Eden* decided the question that no British subject can maintain an action against the captor." . . . "In like manner property taken under color of military authority falls under the same rule. If property be taken by an officer under the supposition that it is the property of an enemy, whether of a State or an individual, which ought to be confiscated, no municipal court can judge of the propriety or impropriety of the seizure. It can be judged only by the authority delegated by the Crown." (3 Phil. International Law, 192, Sect. 130.)

See also *Alexander* v. *The Duke of Wellington*, 2 Russ. and M., 54; *The Army of the Deccan*, 2 Knapp's P. C. R. 106; *Nichol* v. *Goodall*, 10 Vesey, 156; *Hill* v. *Reardon*, 2 Sim. & S. 431; *Duckwork* v. *Tucker*, 2 Taunt. 7; 1 Chitt. General Practice, pp. 2, 18, notes; *Porte* v. *United*

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States, Devereaux's Rep. (Court of Claims), 171. These authorities are decisive upon the subject. If the action would not lie against General Curtis, obviously it will not against his vendee. The principal fact, and the incident which followed, are governed by the same rule. See the case of the *Admiralty*, 13 Co. 53; *Anonymous*, Cro. Eliz. 685; *King* v. *Broom*, Carth. 398; *Turner & Cary* v. *Neele*, 1 Lev. 243; *Ridley* v. *Egglesfield*, 2 Lev. 25.

It was competent for Congress to give the jurisdiction, but it has not seen proper to do so. (Const. U. S. Art. 1, Sect. 8.) We hold this objection to the plaintiff's right to recover well taken. This conclusion does not conflict with the ruling of the Supreme Court in *Mitchell* v. *Harmony* (13 How. 115.) There the property in question belonged to a citizen, and not to an enemy.

2. It remains to consider the second proposition relied upon by the defendant. Chancellor Kent says, —

"In a land war, movable property, after it has been in the complete possession of the enemy twenty-four hours (and which goes by the name of booty, and not prize), becomes absolutely his without any right of postliminy in favor of the original owner; and much more ought this species of property to be protected from the rule of postliminy when it has not only passed into the complete possession of the enemy, but been *bona fide* transferred to a neutral." (1 Kent's Com. 120, last ed.)

"The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor." . . . "As to personal property, or movables, the title is, in general, considered as lost to the former proprietors as soon as the enemy has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the booty has been carried to a place of safety *infra presidia* of the captor." (Lawrence's Wheat. 629.)

"If the hostile power has an interest in the property, which is available to him for purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation." (Dana's Wheat. s. 256, n. 171.)

Vattel says, —

"We have a right to deprive our enemy of his possessions of every kind which may augment his power and enable him to make war." . . . "Whenever we have an opportunity, we seize on the enemy's property, and convert it to our own use; and thus, besides diminishing the enemy's power, we augment our own, and obtain at least a partial indemnification or equivalent either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution. In a word, we do ourselves justice." . . . "As the towns and lands taken from the enemy are called *conquests*, all movable property taken from him comes under the denomination of *booty*. This *booty* naturally belongs to the *sovereign* prosecuting the war, no less than the conquests; for he alone has such claims against the hostile nation as warrant him to seize on such property and convert it to his own use. His soldiers, and even his auxiliaries, are only instruments, which he employs in asserting his right. He maintains and pays them. Whatever they do is in his name and for him." (Vat. Law Nat. pp. 365, 365, Book 3, Chap. 9.)

It is usual to allow those making the capture to appropriate more or less of the property to their own use; but the paramount right and title are,

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nevertheless, in the sovereign, who may assert them whenever it is deemed proper.

Congress, in passing the act of March 12, 1863, in relation to "captured and abandoned property," proceeded upon this ground.

The doctrines thus laid down are in accordance with those of all approved publicists. (See the authorities cited by the authors from whom we have quoted.)

There can be no doubt that the facts, as found, bring this case within these authorities. The commanding general caused the cotton to be seized and brought within his lines. He had a firm possession of it there for more than the requisite time. There is no question as to the right of postliminy. The possession by both the general and the purchaser was unchallenged by the enemy. The purchaser conveyed the property to New York, and there sold it.

Under the law arising upon these facts there can be but one result.

We hold the second objection fatal, also, to the right of the plantiff to recover in this action. If he has any right which can be recognized, it is against the government, and must be asserted elsewhere.

Judgment must be entered for the defendant, with costs.

Trials for Crimes against the United States.

Correspondence between President Johnson and Chief Justice Chase.

On the 2d of February, 1866, the President communicated the following to the Senate: —

To the Senate of the United States:

The accompanying correspondence I herewith transmit, in accordance with the resolution of the 16th ult., requesting the President to communicate to the Senate any correspondence which may have taken place between myself and any of the judges of the Supreme Court touching the holding of civil courts of the United States in insurrectionary States for the trial of crimes against the United States. ANDREW JOHNSON.

EXECUTIVE MANSION,
WASHINGTON, October 2, 1865.

DEAR SIR: It may become necessary that the government prosecute some of the high crimes and misdemeanors committed against the United States within the District of Virginia. Permit me to inquire whether the Circuit Court of the United States for that district is so far organized and in condition to exercise the functions, that yourself or either of the associate justices of the Supreme Court will hold a term of the Circuit Court there during the autumn or early in the winter for the trial of causes.

Very respectfully,
ANDREW JOHNSON.

Hon. S. P. CHASE, Chief Justice of Supreme Court.

WASHINGTON, Thursday Evening,
October 12, 1865.

DEAR SIR: Your letter of the 26th, directed to Cleveland and forwarded to Sandusky, reached me there night before last. I left for Washington yesterday morning, and have just arrived. To your inquiry whether

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a term of the Circuit Court of the United States for the District of Virginia will be held by myself or one of the associate justices of the Supreme Court during the autumn or early winter, I respectfully reply in the negative. Under ordinary circumstances, the regular term authorized by Congress would be held on the fourth Monday of November, which this year will be the 27th. Only a week will intervene between that day and the commencement of the annual term of the Supreme Court, when all the judges are required to be in attendance at Washington. That time is too short for the transaction of any very important business.

Were this otherwise, I so much doubt the propriety of holding Circuit Courts of the United States in States which have been declared by the executive and legislative departments of the national government to be in rebellion, and therefore subjected to martial law, before the complete restoration of their broken relations with the nation and the supersedure of military by civil administration, that I am unwilling to hold such courts in such States within my circuit, which includes Virginia, until Congress shall have had an opportunity to consider and act on the whole subject. A civil court in a district under martial law can only act by the sanction and under suspension of the military power; and I cannot think it becomes justices of the Supreme Court to exercise jurisdiction under such conditions. In this view it is proper to say that Mr. Justice Wayne, whose whole circuit is in the rebel States, concurs with me. I have had no opportunity of consulting with the other justices, but the Supreme Court has hitherto declined to consider cases brought before it by appeal or writ of error from Circuit or District Courts in rebel portions of the country. No very reliable inference, it is true, can be drawn from this action, for circumstances have changed since the court adjourned; but, so far as it goes, it favors the conclusion of myself and Justice Wayne.

With great respect, yours very truly,

S. P. CHASE.

CHIEF JUSTICE CHASE TO THE MEMBERS OF THE BAR.

At the opening of the United States Circuit Court at the State Senate Chamber, Raleigh, North Carolina, June 6, 1867, before proceeding to business the Chief Justice made the following remarks: —

GENTLEMEN OF THE BAR: Before proceeding to the regular business, I think it proper to address a few observations to you. For more than four years the courts of the Union were excluded from North Carolina by rebellion. When active hostilities ceased in 1865, the national military authority took the place of all ordinary civil jurisdiction, or controlled its exercise. All courts, whether State or national, were subordinated to military supremacy, and acted, when they acted at all, under such limitations, and in such cases, as the commanding general, under the direction of the President, thought fit to prescribe. Their process might be disregarded and their judgments and decrees set aside by military orders. Under these circumstances, the justices of the Supreme Court, allotted to circuits which included the insurgent States, abstained from joining the district judges in holding Circuit Courts. Their attendance was unnecessary, for the district judges were fully authorized by law to hold Circuit Courts without the justices of the Supreme Court, and to exercise complete jurisdiction in trial of all criminal and almost all civil cases; and their attendance was unnecessary

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for another reason. Military tribunals at that time, and under existing circumstances, were competent to the exercise of all the jurisdiction, criminal and civil, which belongs, under ordinary circumstances, to the civil courts. Being unnecessary, the justices thought their attendance would be improper and unbecoming. They regarded it as unfit in itself, and injurious in many ways to the public interests, that the highest officers of the judicial department of the government should exercise their jurisdiction under the supervision and control of the executive department. At length, however, military control over the civil tribunals was withdrawn by the President, the writ of *habeas corpus*, which had been suspended, was restored, and military authority in civil matters abrogated. This was effected mostly by the proclamation of April, 1866, and partly by the proclamation of August 20, 1866. These proclamations reinstated the full authority of the national courts in all matters within their jurisdiction. The justices of the Supreme Court are expected to join the district judges in holding Circuit Courts during the interval between the terms at Washington. On the 23d of July, 1866, however, an act of Congress reduced the number of circuits, and changed materially the districts of which the southern circuits were composed, without waiting or providing for an allotment of the members of the Supreme Court to new circuits, and without such allotment the justices of that court have no circuit jurisdiction. The effect of that act, therefore, was to suspend the authority of the justices to hold Circuit Courts in the altered circuits. This suspension was removed by the act of March 2, 1867, by which the new allotment was authorized. Under this act the justices of the Supreme Court have been again assigned to circuit districts. The chief justice has been allotted to hold with district judges the national court in the circuit in which the district of North Carolina is made a part. I am here, therefore, to join my brother, the district judge, in holding the Circuit Court for this district. It is the first Circuit Court held in any district within the insurgent States at which a justice of the Supreme Court could be present, without disregard of superior duties at the seat of government or usurpation of jurisdiction. The associate justices allotted to the other southern circuits will join in holding courts at the regular terms prescribed by law, and thus the national civil jurisdiction will be fully restored throughout the Union. It is true that military authority is still exercised within these southern circuits, but not now, as formerly, in consequence of the disappearance of local authority, and in supervision or control of all tribunals, whether State or national. It is now used under acts of Congress, and only to prevent illegal violence to personal property, and to facilitate the restoration of every State to equal rights and benefits in the Union. This military authority does not extend in any respect to the courts of the United States.

Let us hope that henceforth neither rebellion nor any other occasion for the assertion of any military authority over the courts and justices will hereafter suspend the due course of judicial administration by the national tribunals in any part of the republic.

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THE GRAPESHOT, 7 Wallace, 563.

Upon two separate motions to dismiss an appeal from the decree of the Circuit Court of the United States for the District of Louisiana; the decree being one transferred there under act of Congress, from the late so-called "Provisional Court," of that State; both motions being made by Mr. Durant.

The ground of the first motion was because the transcript was incomplete, "*as appeared by the certificate of the clerk* of the lower court, as given in the printed transcript, and because it further appeared *by the said certificate*, that the missing parts of the record could not be found, so that it was useless to issue a *certiorari*," and on the whole impossible for this court to hear and decide the case.

The ground of the second motion was, that the Circuit Court of the United States in Louisiana had rendered no decree from which an appeal could be taken; so that this court was without jurisdiction.

This Provisional Court of Louisiana . . . had been established by proclamation of the President, in October, 1862, when the war of the rebellion had subverted and swept away the courts of the Union, and, by the terms of its constitution, was to last no longer than till the civil authority was restored.

The Chief Justice delivered the opinion of the court.

The first motion to dismiss this appeal is made upon the ground that the transcript of the record is incomplete, because of the omission of certain papers said to have been used in the court below, but not to be found when the transcript was made.

The motion must be denied. Proof that the papers alleged to be wanting were used in the court below, and have been lost, must be made by affidavit. The certificate of the clerk who made the transcript cannot be received as proper evidence of these facts.

The other motion is made upon the ground that the decree below was rendered by the Provisional Court of Louisiana, established by the military authority of the President, during the late rebellion, from which no appeal could be properly taken. But we find, on looking into the statutes, that when the Provisional Court ceased to exist, its judgments and decrees were directed to be transferred into the Circuit Court, and to stand as the judgments and decrees of that court. And it is from the decree of the Circuit Court that the appeal under consideration was taken. As an appeal from that court it was regular, and the motion to dismiss must be denied.

All questions concerning the validity of judgments and decrees of the Provisional Court will remain open until after final hearing.

Motions denied.

THE STATE OF TEXAS *v.* WHITE, 7 Wallace, 702.

For the opinion of the majority of the court in this interesting and important case, the reader is referred to the Reports above cited. The following are the dissenting opinions of the minority of the judges: —

Mr. Justice Grier, dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case.

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The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authority of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as *a political fact*, not as a *legal fiction*. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by Chief Justice Marshall in the case of *Hepburn & Dundass* v. *Ellxey*.* As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says, —

"The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a 'State' according to the definition of writers on general law. This is true; but as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy *only* are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one representative. 'The Senate of the United States shall be composed of two senators from each State.' Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations."

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March, 2, 1867, declares Texas to be a "rebel State," and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the "military authorities of the United States."

It is true that no organized rebellion now exists there, and the courts of

* 2 Cranch, 452.

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the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dacotah is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?

Now, by assuming or admitting *as a fact* the present *status* of Texas as a State not in the Union *politically*, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to *the fact* as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. *Politically*, Texas is not *a State in this Union.* Whether rightfully out of it or not is a question not before the court.

But conceding now the fact to be as judicially assumed by my brethren, the next question is, whether she has a right to repudiate her contracts? Before proceeding to answer this question, we must notice a fact in this case that was forgotten in the argument. I mean, that the United States are no party to this suit, and refusing to pay the bonds because the money paid would be used to advance the interests of the rebellion. It is a matter of utter insignificance to the government of the United States to whom she makes the payment of these bonds. They are payable to the bearer. The government is not bound to inquire into the *bona fides* of the holder, nor whether the State of Texas has parted with the bonds wisely or foolishly. And although by the Reconstruction Acts she is required to repudiate all debts contracted for the purposes of the rebellion, this does not annul all acts of the State government during the rebellion, or contracts for other purposes, nor authorize the State to repudiate them.

Now, whether we assume the State of Texas to be judicially in the Union (though actually out of it) or not, it will not alter the case. The contest now is between the State of Texas and her own citizens. She seeks to annul a contract with the respondents, based on the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion. Having relied upon one fiction, namely, that she *is* a State in the Union, she now relies upon a second one, which she wishes this court to adopt, that she was not a State at all during the five years that she was in rebellion. She now sets up the plea of *insanity*, and asks the court to treat all her acts made during the disease as void.

We have had some very astute logic to prove that judicially she was not a State at all, although governed by her own legislature and executive as "a distinct political body."

The ordinance of secession was adopted by the convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, "by battle," * as to her right to secede, has been against her. But that verdict did not settle any question not involved in the case. It did not settle the question of her right to plead insanity and set aside all her

* Prize Cases, 2 Black. 673.

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contracts, made during the pending of the trial, with her own citizens, for food, clothing, or medicines. The same "organized political body," exercising the sovereign power of the State, which required the indorsement of these bonds by the governor, also passed the laws authorizing the disposal of them without such indorsement. She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be "an organized political body," exercising all the powers and functions of an independent sovereign State. Whether a State *de facto* or *de jure*, she is estopped from denying her identity in disputes with her own citizens. If they have not fulfilled their contract, she can have her legal remedy for the breach of it in her own courts.

But the case of Hardenberg differs from that of the other defendants. He purchased the bonds in open market, *bonâ fide*, and for a full consideration. Now, it is to be observed that these bonds are payable to bearer, and that this court is appealed to as a court of equity. The argument to justify a decree in favor of the Commonwealth of Texas as against Hardenberg, is simply this: These bonds, though payable to bearer, are redeemable fourteen years from date. The government has exercised her privilege of paying the interest for a term without redeeming the principal, which gives an additional value to the bonds. *Ergo*, the bonds are dishonored. *Ergo*, the former owner has a right to resume the possession of them, and reclaim them from a *bonâ fide* owner by a decree of a court of equity.

This is the legal argument, when put in the form of a logical sorites, by which Texas invokes our aid to assist her in the perpetration of this great wrong.

A court of chancery is said to be a court of conscience; and however astute may be the argument introduced to *defend* this decree, I can only say that neither my reason nor my conscience can give assent to it.

Mr. Justice Swayne.

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case I agree with the majority of my brethren.

I am authorized to say that my brother Miller unites with me in these views.

THE GRAPESHOT, 9 WALLACE, 131.

The constitutional power of the President to establish provisional courts during the civil war, in the rebel territory, affirmed.

The Chief Justice delivered the opinion of the court.

The first question to be examined in this case is one of jurisdiction.

The suit, shown by the record, was originally instituted in the District Court of the United States for the District of Louisiana, where a decree was rendered for the libellant. From this decree an appeal was taken to the Circuit Court, where the case was pending, when, in 1861, the proceedings of the court were interrupted by the civil war. Louisiana had become involved in the rebellion, and the courts and officers of the United States were

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excluded from its limits. In 1862, however, the National authority had been partially re-established in the State, though still liable to be overthrown by the vicissitudes of war. The troops of the Union occupied New Orleans, and held military possession of the city and such other portions of the State as had submitted to the general government. The nature of this occupation and possession was fully explained in the case of *The Venice*.*

Whilst it continued, on the 20th of October, 1862, President Lincoln, by proclamation, instituted a Provisional Court for the State of Louisiana, with authority, among other powers, to hear, try, and determine all causes in admiralty. Subsequently, by consent of parties, this cause was transferred into the Provisional Court thus constituted, and was heard, and a decree was again rendered in favor of the libellants. Upon the restoration of civil authority in the State, the Provisional Court, limited in duration, according to the terms of the proclamation, by that event, ceased to exist.

On the 28th of July, 1866, Congress enacted that all suits, causes, and proceedings in the Provisional Court, proper for the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders, and decrees of the Provisional Court in causes transferred to the Circuit Court should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly.†

It is questioned, upon these facts, whether the establishment by the President of a Provisional Court was warranted by the Constitution.

That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here, that nothing further need be said on that point.

The object of the National government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.

What that duty is, when the territory occupied by the National forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer* v. *Webb*,‡ the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker* v. *Montgomery*,§ and *Cross* v. *Harrison*,|| may also be cited in illustration of the principles applicable to military occupation.

We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and

* 2 Wallace, 259.

† 15 Stat. at Large, 366.

‡ 20 Howard, 176.

§ 13 Id. 498, and 18 Id. 110.

|| 16 Id. 164. See also *United States* v. *Rice*, 4 Wheaton, 246; and *Texas* v. *White*, 7 Wallace, 700.

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the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.

The case then being regularly here, we will proceed to dispose of it.

THE UNITED STATES *v.* ANDERSON, 9 Wallace, 64.

Mr. Justice Davis delivered the opinion of the court.

Whether the positions taken by the learned counsel of the United States in the court below, and maintained in this court also, are well taken or not depends on the construction to be given the act concerning abandoned and captured property, and the 4th section of the act of June 25, 1868.

The act of March 12, 1863, in one particular, inaugurated a policy different from that which induced the passage of other measures rendered necessary by the obstinacy and magnitude of the resistance to the supremacy of the National authority. To overcome this resistance, and to carry on the war successfully, the entire people of the States in rebellion were considered as public enemies; but it is familiar history that there were many persons whom necessity required should be treated as enemies who were friends, and adhered with fidelity to the National cause. This class of people, compelled to live among those who were combined to overthrow the Federal authority, and liable at all times to be stripped of their property by the usurped government, were objects of sympathy to the loyal people of this country, and their unfortunate condition was appreciated by Congress.

During the progress of the war it was expected that our forces in the field would capture property, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the status of the loyal Southern people, and distinguished between property owned by them and the property of the disloyal. It was not required to do this, for all the property obtained in this manner could, by proper proceedings, have been appropriated to the necessities of the war. But Congress did not think proper to do this. In a spirit of liberality it constituted the government a trustee for so much of this property as belonged to the faithful Southern people, and while directing that all of it should be sold and its proceeds paid into the treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in the Court of Claims, and establish their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership.

It is true the liberality of Congress in this regard was not confined to Southern owners, for the law is general in its terms, and protects all loyal owners; but the number of Northern citizens who could, in any state of the case, be *bona fide* owners of this kind of property was necessarily few, and their condition, although recognized in the law, did not induce Congress to incorporate in it the provision we are considering.

The measure, in itself of great beneficence, was practically important only in its application to the loyal Southern people, and sympathy for their situation doubtless prompted Congress to pass it. It is in view of this state of things, as it is the duty of a court in construing a law to consider the circumstances under which it was passed and the object to be accomplished by it, that we are called upon to apply this particular provision to the facts of

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this case. The loyalty of the claimant is not questioned, but his ownership, in the sense of the law, of the property in dispute is denied.

It is not denied that he purchased the property in good faith for value, and with no purpose to defraud the government or any one else; but it is said the persons from whom he bought resided in South Carolina, were presumed to be rebels, and were, therefore, prohibited from selling.

This is an attempt to import from the confiscation law of July 17, 1862, into this law, a disability which it does not contain. If this could be done, but very little benefit would accrue to the loyal people of the South from the privilege conferred on them by the law in question. It is well known that nearly all the Southern people were engaged in the rebellion, and that those who were not thus employed furnished the exception rather than the rule. Few as they were, the necessities of life required that they should buy and sell, and, equally so, that their trading should be free and unrestricted.

This condition of things Congress was aware of, and if it had been its purpose to limit the privilege in controversy to the loyal citizen, who happened to acquire his property from another person equally loyal, they would have said so. But Congress had no such narrow policy in view. Its policy in the matter was broad and comprehensive, and embraced within its range all persons who had adhered to the Union. It treated all alike, and did not discriminate in favor of the person who could trace his title through a loyal source, and against him who was not so fortunate. It did not consider the loyal planter, who raised his own cotton and rice, as entitled to any more protection than the dweller in the cities and towns who lived by traffic, and bought where he could buy the cheapest.

The confiscation law, however, was not intended to apply to a person occupying the status of this claimant. The purpose which Congress had in view in passing that law was very different from that which induced it, in the Captured and Abandoned Property Act, to extend a privilege to the loyal owner. The confiscation law concerns rebels and their property; was intended as a measure to cripple their resources; and, in so far as it claims the right to seize and condemn their property, as a punishment for their crimes, recognizes that certain legal proceedings are necessary to do so. But by the act in question the government yielded its right to seize and condemn the property which it took in the enemy's country if it belonged to a faithful citizen, and substantially said to him, "We are obliged to take the property of friend and foe alike, which we will sell and deposit the proceeds of in the treasury; and if, at any time within two years after the suppression of the rebellion, you prove satisfactorily that of the property thus taken you owned a part, we will pay you the net amount received from its sale."

The two acts cannot be construed *in pari materiâ*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege.

It is said the vendors of the cotton were incompetent witnesses by reason of the 4th section of the act of June 25, 1868, which declares that no plaintiff or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim, or right against the United States, or any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in supporting any such title, claim, or right.

There are three classes of persons who are, by this section, prohibited from testifying. The claimant cannot testify, nor can the person who, after a claim has accrued to him against the United States, has sold or transferred it to the claimant, nor can any one who is interested in the event of the suit. Doucen and Fleming, the immediate vendors of Anderson, are not excluded by this rule. They were not interested in the suit, and in no sense did Anderson derive his claim against the United States through them. They never had any claim against the United States, because when the

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property was taken it belonged to Anderson, and it is only after the property was sold that Anderson's claim even to the proceeds attached. If the property *in transitu* from Charleston to New York had been lost, no claim could arise under the law in favor of Anderson against the United States, his claim being contingent upon the proceeds of the property finally reaching the treasury.

But the point most pressed in the argument against the right to recover in this case relates to the limitation in the law. It is contended that the claim was barred by this limitation, as it was not preferred until the 5th of June, 1868. It is, therefore, necessary to determine when the time for preferring claims commenced, and when it ended. The words of the statute on this subject are, that any person claiming to be the owner of abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims. There is certainly nothing in the words of this provision which disables a person from preferring his claim immediately after the proceeds of his property have reached the treasury, and there is no good reason why a different interpretation should be given them. On the contrary, there is sufficient reason in the nature of the legislation on this subject, apart from the letter of the law, to bring the mind to the conclusion that Congress intended to give the claimant an immediate right of action. The same motive that prompted Congress to grant the privilege to prefer a claim at all, operated to allow it to be done so soon as the property had been converted into money. If, in the condition of the country, it was known that the Union men of the South, as a general thing, would be unable to prosecute their claims while the war lasted, still it was recognized that some persons might be fortunate enough to do so, and to meet the requirements of their cases the right to sue at once was conferred. In the progress of the war, as our armies advanced and were able to afford protection to the Union people, it was expected that many of them, availing themselves of the opportunity, would escape into the National lines, and be thus in a condition to secure the rights conceded to them by this statute; and the history of the times informs us that this expectation was realized. To impute to Congress a design to compel these people, impoverished as they were known to be, to wait until the war was over before they could institute proceedings in the Court of Claims, would be inconsistent with the general spirit of the statute, and cannot be entertained. If, then, the right to prefer a claim attached as soon as the money reached the territory, when did it expire? The law says two years after the rebellion was suppressed; but the question recurs, when is the rebellion to be considered suppressed, as regards the rights intended to be secured by this statute? It is very clear that the limitation applied to the entire suppression of the rebellion, and that no one was intended to be affected by its suppression in any particular locality. It might be suppressed in one State and not in another, but the citizen of the State that had ceased hostilities was in no better or worse position in this regard than the citizen of the State where hostilities were active. The limitation was not partial in its character, but operated on all persons alike who are affected by it; was dependent on the solution of a great problem, and an interpretation of it which would prescribe one rule for the people of one State, and a different rule for those living in another State, cannot be allowed to prevail.

The point, therefore, for determination is, when, in the sense of this law, was the rebellion entirely suppressed. And in this connection it is proper to say, that the purposes of this suit do not require us to discuss the question — which may have an important bearing on other cases — whether the rebellion can be considered as suppressed for one purpose and not for an-

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other, nor any of the kindred questions arising out of it, and we therefore express no opinion on the subject.

The inquiry with which we have to deal concerns its suppression only in its relation to those persons who are within the protection of this law. It is argued, as the rebellion was in point of fact suppressed when the last Confederate general surrendered to the National authority, that the limitation began to run from that date. If this were so, there is an end to the controversy; but did Congress mean, when it passed the statute in question, that the Union men of the South, whose interests are especially cared for by it, should, without any action by Congress or the Executive on the subject, take notice of the day that armed hostilities ceased between the contending parties, and if they did not present their claims within two years of that time, be forever barred of their recovery? The inherent difficulty of determining such a matter, renders it certain that Congress did not intend to impose on this class of persons the necessity of deciding it for themselves. In a foreign war, a treaty of peace would be the evidence of the time when it closed, but in a domestic war, like the late one, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated, and we are of the opinion that Congress did not intend that the limitation in this act should begin to run until this was done. There are various acts of Congress and proclamations of the President bearing on the subject, but in the view we take of this case, it is only necessary to notice the proclamation of the President, of August 20, 1866, and the act of Congress of the 2d of March, 1867.

On the 20th day of August, 1866, the President of the United States, after reciting certain proclamations and acts of Congress concerning the rebellion, and his proclamation of 2d of April, 1866, that armed resistance had ceased everywhere except in the State of Texas, did proclaim that it had ceased there also, and that the whole insurrection was at an end, and that peace, order, and tranquillity existed throughout the whole of the United States of America. This is the first official delaration that we have, on the part of the Executive, that the rebellion was wholly suppressed, and we have shown, in a previous part of this opinion, that the limitation, in its effects on the persons whose rights we are considering, did not begin to run until the rebellion was suppressed throughout the whole country. But we are not without the action of the legislative department of the government on this subject. On the 20th day of June, 1864, Congress fixed the pay of non-commissioned officers and privates, and declared that it should continue during the rebellion; and on the 2d day of March, 1867, it continued this act in force for three years from and after the close of the rebellion, as announced by the proclamation of the President.

Congress, then, having adopted the 20th day of August, 1866, in conformity with the announcement of the President, as the day the rebellion closed, for the purpose of regulating the pay of non-commissioned officers and privates, can it be supposed that it intended to lay down a harsher rule for the guidance of the claimants under the Captured and Abandoned Property Act, than it thought proper to apply to another class of persons whose interests it equally desired to protect. In order to reach this conclusion, it is necessary to ascribe to Congress a policy regarding the statute under which this claim is preferred foreign to the views we have expressed concerning it. Besides, it would require us to construe two acts differently, although relating to the same general subject, in the absence of any evidence that such was the intention of the legislature. If we are right as to the motive which prompted Congress to pass the law in question, and the object to be accomplished by it, it is clear the point of time should be construed most favorably to the person who adhered to the National Union, and who

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has proved the government took his property, and has the money arising from its sale in the treasury.

As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it. That day will, therefore, be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.

The point taken that the court below was not authorized to render judgment for a specific sum, but only to determine whether the claimant was entitled to receive the proceeds of his property, leaving it for an officer of the treasury to fix the amount, cannot be sustained. To sustain this position, would require us to hold that for this class of cases Congress intended to constitute the Court of Claims a mere commission. This court will not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect.

It is proper to say, in conclusion, that the case of *McKee* v. *United States*,* cited as an authority against the claimant's right to recover, has no application whatever to this case.

Judgment affirmed.

THE UNITED STATES *v.* KEEHLER, 9 Wallace, 86.

Mr. Justice Miller delivered the opinion of the court.

It is stated that the Confederate Congress passed an act appropriating balances of this kind to the payment of claims against the United States for postal service, where the parties resided within the limits of the States in rebellion, and that under this act an order was drawn by the post-office department of the Confederate States on Keehler, directing him to pay this money to Clemmens, and that on this order it was paid.

It certainly cannot be admitted for a moment that a statute of the Confederate States, or the order of its postmaster general, could have any legal effect in making the payment to Clemmens valid. The whole Confederate power must be regarded by us as a usurpation of unlawful authority, incapable of passing any valid laws, and certainly incapable of divesting, by an act of its Congress or an order of one of its departments, any right or property of the United States. Whatever weight may be given under some circumstances to its acts of force, on the ground of irresistible power, or whatever effect may be allowed in proper cases to the legislation of the States while in insurrection, — questions which we propose to decide only when they arise, — the acts of the Confederate Congress can have no force, as law, in divesting or transferring rights, or as authority for any act opposed to the just authority of the Federal government. This statute of the Confederate Congress and this draft of its post-office department are not, therefore, a sufficient authority for the payment to Clemmens.

HICKMAN *v.* JONES, 9 Wallace, 198.

Mr. Justice Swayne stated the case, and delivered the opinion of the court.

The facts disclosed in the record, so far as it is necessary to state them, are as follows: —

During the late civil war, the rebel government established a court known

* 8 Wallace, 163.

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as the "District Court of the Confederate States of America for the Northern District of Alabama." In that court the plaintiff in error was indicted for treason against the Confederate States. The indictment alleged that troops of the United States were in the Northern District of Alabama engaged in a hostile enterprise against the Confederate States, and that Hickman "did traitorously then and there assemble and continue with the said troops of the said United States in the prosecution of their said expedition against the Confederate States; and then and there, with force and arms and with the traitorous intention of co-operating with the said troops of the United States in effecting the object of the said hostile expedition, did array and dispose himself with them in a hostile and warlike manner against the said Confederate States; and then and there, with force and arms, in pursuance of such his traitorous intentions, he, the said James Hickman, with the said persons, so as aforesaid assembled, armed, and arrayed in manner aforesaid, wickedly and traitorously did levy war against the said Confederate States." Upon this indictment a warrant was issued for the arrest of Hickman. He was arrested and imprisoned accordingly. He applied to the defendant, Jones, who assumed to act as judge of the court, to be allowed to give bail. Jones rejected the application, and remanded him to prison. He was subsequently tried, acquitted, and discharged. He alleges that the proceeding was without probable cause, and malicious. Moore was the clerk of the pretended court. The name of Regan is signed to the indictment as district attorney, and he conducted the trial. Robert W. Coltart was deputy marshal, and Clay was the editor and publisher of the "Huntsville Confederate," a newspaper through which it was alleged he incited the prosecution by means of malicious attacks upon Hickman designed to produce that result. The other defendants were members of the grand jury by which the indictment was found. Testimony was given tending to show that the plaintiff sympathized with the rebellion and participated in it while the rebel power predominated in North Alabama, both before and after its first invasion by the forces of the United States. The court instructed the jury, among other things, as follows:—

"If, in the case at the bar, you believe that the acts and speeches of the plaintiff, upon which the defendants rely to prove his complicity with the rebellion, were the result of anything less than a fear that if he did not so speak and act, his life or his liberty or his property would be sacrificed to his silence or his omission, you will find a verdict for the defendants.

"If, on the other hand, you believe that these acts of apparent complicity with the rebellion were performed by the plaintiff under the influence of an honest and rational apprehension that to do otherwise would expose him to persecution or prosecution, or to loss of life, liberty, or property, and that notwithstanding these acts of affiliation with the rebel community in which he lived, he was always at heart honestly and truly loyal to the government of his country, he is entitled to your verdict."

The jury were further instructed that it was their duty to acquit the defendants, R. W. Coltart and Clay. Exceptions were duly taken by the plaintiff, and the case is brought here for review.

We have to complain in this case, as we do frequently, of the manner in which the bill of exceptions has been prepared. It contains all the evidence adduced on both sides, and the entire charge of the court. This is a direct violation of the rule of this court upon the subject. We have looked into the evidence and the charge only so far as was necessary to enable us fully to comprehend the points presented for our consideration — thus in effect reducing the bill to the dimensions which the rule prescribes. No good result can follow in any case from exceeding this standard. Our labors are

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unnecessarily increased, and the case intended to be presented is not unfrequently obscured and confused by the excess.

The rebellion out of which the war grew was without any legal sanction. In the eye of the law, it had the same properties as if it had been the insurrection of a county or smaller municipal territory against the State to which it belonged. The proportions and duration of the struggle did not affect its character. Nor was there a rebel government *de facto* in such a sense as to give any legal efficacy to its acts. It was not recognized by the National, nor by any foreign government. It was not at any time in possession of the capital of the nation. It did not for a moment displace the rightful government. That government was always in existence, always in the regular discharge of its functions, and constantly exercising all its military power to put down the resistance to its authority in the insurrectionary States. The union of the States, for all the purposes of the Constitution, is as perfect and indissoluble as the union of the integral parts of the States themselves; and nothing but revolutionary violence can, in either case, destroy the ties which hold the parts together. For the sake of humanity, certain belligerent rights were conceded to the insurgents in arms. But the recognition did not extend to the pretended government of the Confederacy. The intercourse was confined to its military authorities. In no instance was there intercourse otherwise than of this character. The rebellion was simply an armed resistance to the rightful authority of the sovereign. Such was its character in its rise, progress, and downfall. The act of the Confederate Congress creating the tribunal in question was void. It was as if it were not. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted. In the case before us, trespass would have been the appropriate remedy; but the authorities are clear that case also may be maintained. Each form of action is governed by its own principles. It is needless to consider them, as none of the exceptions taken relate to that subject. Our opinion will be confined to those which have been specifically mentioned.

1. The court instructed the jury to acquit the defendants, J. W. Clay and R. W. Coltart.

There was some evidence against both of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury under the instructions of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But its application to the facts — and the facts themselves — it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance.

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They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken.*

2. The other instruction to be considered was, substantially, that if the plaintiff had himself been a traitor he could not recover against those who had been instrumental in his arrest, imprisonment, and trial for treason against the Confederacy — the treason alleged to consist in the aid which he had given to the troops of the United States while engaged in suppressing the rebellion.

As matter of law, we do not see any connection between the two elements of this proposition. Giving aid to the troops of the United States, by whomsoever given, and whatever the cirsumstances, was a lawful and meritorious act. If the plaintiff had before co-operated with the rebels there was a *locus penitentiæ*, which, whenever he chose to do so, he had a right to occupy. His past or subsequent complicity with those engaged in the rebellion might affect his character, but could not take away his legal rights. It certainly could not, as matter of law, give impunity to those by whose instrumentality he was seized, imprisoned, and tried upon a capital charge for serving his country. Such a justification would be a strange anomaly. Evidence of treasonable acts on his part against the United States was alien to the issue before the jury. To admit it was to put the plaintiff on trial as well as the defendants. The proofs upon the question thus raised might be more voluminous than those upon the issue made by the pleadings. The trial might be indefinitely prolonged. The minds of the jury could hardly fail to be darkened and confused as to the real character of the case and the duty they were called upon to discharge. The guilt of the plaintiff, if established, could in no wise affect the legal liability of the defendants; nor could the fact be received in mitigation of damages. It is well settled, that proof of the bad character of the plaintiff is inadmissible for any purpose in actions for malicious prosecution.† All the evidence upon this subject disclosed in the bill of exceptions was incompetent, and should have been excluded from going to the jury. This instruction also was erroneous.

Judgment reversed, and the cause remanded to the court below, with an order to issue a *venire de novo*.

BIGELOW *v.* FORREST, 9 Wallace, 339.

In this case the court decide that the confiscation act of 17th July, 1862, is to be construed in connection with the joint explanatory resolution of the same date (12 Stat. at Large, 627), and that upon a decree of condemation under this act, all that could be sold was a life estate of the criminal.

The learned reader is referred also to the following cases: —

McKee v. *U. S.*, 8 Wallace, 168.
The U. S. v. *Lane*, 8 ib. 185.
Morris' Cotton, 8 ib. 507.
The Ouachita Cotton Case, 6 ib. 521.
Union Ins. Co. v. *U. S.*, 6 ib. 765.
Armstrong's Foundry, 6 ib. 769.

* *Aylwin* v. *Ulmer*, 12 Massachusetts, 22; *New York Fire Insurance Company* v. *Walden*, 12 Johnson, 513; *Utica Insurance Company* v. *Badger*, 3 Wendell, 102; *Tufts* v. *Seabury*, 11 Pickering, 140; *Morton* v. *Fairbanks*, Ib. 368; *Fisher* v. *Duncan*, 1 Hening and Munford, 562; *Schuchardt* v. *Allens*, 1 Wallace, 359.

† 1 Greenleaf's Evidence, § 55.

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